

HINDOO
LAW OF ADOPTION.

A

CRITICAL ESSAY

ON THE

HINDOO LAW OF ADOPTION.

BY

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PREFACE.

THE author considers an apology hardly necessary in presenting to the public a treatise on a subject of law so manifold in its aspect and so vast and complicated in its nature as the Hindoo Law of Adoption. It is to be hoped that, from the particular importance of this branch of Hindoo law, no number of treatise that may throw any amount of light upon the subject will be considered too numerous. The object of the present little volume is to lay before the public and legal practitioners especially, in a concise and convenient form, the broad principles of this branch of Hindoo law as originally propounded by the ancient Hindoo legislators and interpreted by various commentators, and as subsequently modified, altered, and in some instances even superseded by the English text-writers and decisions of Courts of Justice. Anyone who has attained to only a fair knowledge of Hindoo law, and has even superficially compared the law of the original texts with the law as it stands at present stereotyped in the pages of the celebrated English text-writers, and confirmed by numerous judicial decisions which have become precedents, must have observed the sad mutilations it has suffered, and reflected with wonder upon the arbitrariness and oversight to which sometimes it has

had to succumb. It is the aim of the author of this volume to show by practical illustrations the truth of these remarks.

In attempting to do this, the author is fully aware that he is entering the list with such men as Machaghten, Strange, Elberling, Colebrooke, &c.,—veterans in the field of Hindoo law, and whose high attainments and established reputation are sufficient to ward off any attack, and therefore this attempt may seem hazardous and presumptuous. But with all due deference to their opinion, their high juridical attainments, and their painful researches through the vast field of Hindoo law, it would not perhaps be a piece of effrontery or audacity to say that in some instances they have propounded doctrines repugnant to the spirit and letter of the Hindoo law and inconsistent with the views and notions of the original writers. Neither have the Courts of Justice withheld their hands from this work of mutilation and supersession, nor have they been sparing in the exercise of that ample power which they possess of virtually superseding and altering the law when attempting to interpret it. When this branch of the law of our country was administered by those who were unacquainted with the notions, usages, and customs of the country, and who derived their knowledge of it from translations which are not often faithful, and got their doubts solved and obscurities cleared up by the subtle court pandits, who were perhaps too ready to vary their versions as it suited their purpose and interest, it cannot be in the least wondered at that that uniformity of decisions which pervades the other branches of law is not here preserved. It is this judiciary license (if he may be allowed to use the phrase) and sometimes unwarrantable doctrines of the English text-writers, that it is the object of the

present writer to bring to the notice of those who are dealing in and administering the law ; and he will consider himself amply compensated, and his labour sufficiently repaid, if Hindoos and those versed in Hindoo law find it worth their while to peruse his little book and think that it repays the perusal.

The author is afraid that in some places he is a little too vehement and strong in his language, and has used expressions with regard to the English text-writers which, considering the deservedly eminent position they hold among the jurists, may, it is feared, be deemed presumptuous and improper. For this the author has no other apology than to say that if in some places his language may be strong, nothing could be farther from his mind than to speak with disrespect or in disparagement of those eminent authors and jurists who effected a complete revolution in the administration of Hindoo law by removing those obstacles till then thought insurmountable, and revealing to European Judges the *Sanghitas* which had hitherto been sealed books. If it is a blessing for people governed by laws to have those laws comprehended by and their sources put before those who administer them, instead of receiving them through the medium of experts and pandits, it is certainly they who can claim the glory ; and with all their blemishes the obligations which the administrators of law and those who are amenable to it must feel towards them, are immense.

As regards the arrangement of the subject-matter, I have followed the method which other writers upon the subject have done. The book is accordingly divided into seven chapters. The first treating of "Who can adopt a son;" the second, "Who can give a son in adoption;" the third, "Who is to be adopted;" the

fourth, "Can a widow in Bengal adopt without permission;" the fifth, "The effects of adoption;" the sixth, "Forms to be observed in adoption;" the seventh, The *Kritrima* form of adoption."

The fourth Chapter may seem altogether new, and about a doctrine which seemed never open to question, but was universally followed by the Jurists and Judges as settled law, without caring to know whether it was in accordance with the provisions of Hindoo law. It is really amusing to see how this question has escaped the attention of the lawyers and Judges, who, putting an implicit belief upon the popularly received doctrine, were never once struck with the idea that this doctrine, so almost universally received and implicitly believed as true, might after all be an oversight or an error. This remark may seem somewhat bold; and the author, therefore, begs that, before proceeding with Chapter IV, the reader will go through the cases noted in the margin. It will be found that the writers on Hindoo law were dealing with the question about widow's incompetency to adopt without her husband's permission by citing only a portion of Vashistha's text; and that the questions whether, according to the Dattaka Chandrika, absence of prohibition constitutes assent, and whether it applies equally to both the giving and receiving of a son, have never been decided in Bengal.

The *Ramnad Case*, Mad. H. C. Rep., Vol. II, p. 206; P. C. Judgment, Vol. II, p. 135.
Joy Ram Dhami v. *Musan Dhami*, Sel. Rep, Vol. V, p. 3, new edition.
Rajah Shumsher Mul v. *Ranee Dilraj Koonwar*, Sel. Rep., Vol. VI, p. 169, new edition, p. 216.
Rajah Hemanchal Sing v. *Koonwar Gunsheam Sing*, P. C. Judgment, Vol. I, p. 4.

The author is fully aware that this little volume is open to many objections on the score of arrangement, method, amplification, lengthy quotations, and repetitions. The "arrangement" has been already explained. With

regard to the "method," it will suffice to say that it has never been the aim of the author to be overscrupulous in his logic where he could express his thoughts simply and easily by a common-sense-kind-of argument. With regard to "quotations and repetitions," it must be said that, owing to his eager desire to avoid all kinds of ambiguities and obscurities, it was thought advisable to have recourse to quotations and repetitions rather than run the risk of being ambiguous and obscure by preserving sententiousness and laconism in his arguments. Besides, the extreme abstruse nature of the subject itself to a certain degree rendered necessary a little prolixity in order to preserve clearness.

No pains have been spared by the author in making this volume, so far as practicable, a complete, and at the same time a handy, manual relating to the law of adoption. The reader will find almost all the interesting decisions of the several High Courts of Judicature and of the Judicial Committee of Her Majesty's Privy Council that have a bearing upon the subject, quoted and commented upon; and of which, for the sake of convenience, a separate list, arranged in alphabetical order, has been appended. Also almost all the authors, both English and native, who are considered authorities in the several schools of law in different parts of India, have been consulted, and a list of these, for the reader's information, has also been given.

In many places where, for the sake of perspicuity or any other reason, it has been thought necessary, original texts in Sanskrit, together with their authoritative translations and Sanskrit annotations, have been quoted. It is, therefore, hoped, that nothing has been omitted to render the book generally acceptable and worthy of public patronage, which is respectfully solicited.

In conclusion, the author begs to offer his heartfelt thanks to Pandit Isvar Chandra Vidyaságar and Baboo Sayama Charan Sirkar for many valuable hints and suggestions received by him from their excellent books.

MYMENSINGH,

The 16*th April*, 1880.

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ERRATA.

Page 7, line 4, *instead of* "on the face," *read* "on the strength."

Page 9, line 18, *instead of* "the terms," *read* "the term."

Page 9, line 19, *instead of* "are to be limited," *read* "is to be limited."

Page 9, line 20, *instead of* "or is to be extended," *read* "or to be extended."

Page 19, line 33, *instead of* "The text," *read* "The texts."

Page 20, line 23, *instead of* "মন্বর্থ বীপরিতার্য্যা সা স্মৃতির্নঃ প্রসস্যতে (বৃহস্পতী)" *read* "মন্বর্থ বিপরীতা যা সা স্মৃতিঃর্ন প্রসস্যতে (বৃহস্পতী)"

Page 32, line 22, *instead of* "placita," *read* "placitum."

Page 63, line 11, *instead of* "give," *read* "gives."

Page 76, line 6, *instead of* "পরম্পরানুজ্ঞয়," *read* "পরম্পরানুজ্ঞয়া"

Page 90, line 11, *instead of* "Vol. I, Sec. I," *read* "Sec. I."

Page 106, line 22, *instead of* "between a vyavastha," *read* "between vyavasthas."

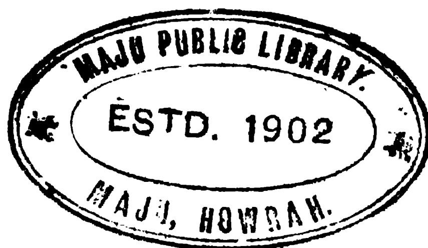
Page 131, line 31, *instead of* "Justice Mitter has arrived," *read* "he has arrived."

Page 134, line 15, *instead of* "is adorned," *read* "if adorned."

Page 134, line 16, *instead of* "entitled to only a fifth, &c.," *read* "is entitled to only a fifth, &c."

Page 140, line 1, *instead of* "or would he be entitled," *read* "or will he be entitled."

Page 92, para. 2, in the marginal notes, *after* "Sudder Dewani Decision for 1862," *read* "W. R., Vols. I to XXV."



HINDOO LAW OF ADOPTION:

A CRITICAL ESSAY.

CHAPTER I.

WHO CAN ADOPT A SON?

THE Hindoo Law of Adoption, like that of Inheritance, is based upon the spiritual necessities of a Hindoo. The extreme necessity for the adoption of a son is shown by the undermentioned texts of the (Rishees) sages.*

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* *Menu* and *Vishnu* :—Since the son (*trayate*) delivers his father from hell named "Put," he was, therefore, called Puttra by Brahma himself.

Harita :—A certain hell is called "Put," and he who is destitute of male issue, is there tormented; a son is therefore called "Puttra," because he delivers his father from that region of horror.

Vrihaspati :—Because a son delivers his father from the hell called "Put," even by the sight of his countenance, therefore is a man solicitous for the birth of a son.

2. A son's son and the son of an appointed daughter, both contribute to the attainment of heavenly bliss; both are equally pronounced fit for inheritance and oblations of funeral cakes.

Menu and *Vasishtha* :—On him he devolves the burden of debt, by him he procures immortality, through him he joyfully becomes exonerated from every debt to living progenitors.

Sancha and *Lichita* and *Paithinasi* :—By a son, however produced, a father prospers; through his oblations of funeral cakes he becomes exonerated from debt to his progenitors.

Harita :—He who has a son, pure, capable, and virtuous in the first period of life, and perfected by the correction of his own defects, transports his ancestors over the abyss of death.

Sancha and *Lichita* :—The perpetual support of a consecrated fire and the like, the scriptures, and sacrifices rewarded with ample gratuities, do not procure the sixteenth part of the benefit arising from the birth of an eldest son.

2. Heaven is attained through the means of him who is celebrated as the fire of a son and of a grandson, and whose many children and himself, while living, had completed the study of scripture and *the performance* of sacrifice.

The perpetuation of lineage and the celebration of name are considered as secondary reasons for resorting to adoption. Though these may appear as secondary reasons, yet in some cases they are allowed to take precedence over spiritual necessity; for instance, a man having a brother's son living is only allowed to

With whom scripture and sacrifice is not incomplete, whose study of the *Vedas* and performance of sacrifice fail not, and that if he have many sons; such is the construction. It consequently appears to be a benefit arising from numerous issue; that many sons, and the father himself, fail not in the study of scripture and performance of sacrifice. "Many sons are to be desired, that some one of them may travel to Gya." Hence sons of various descriptions may be adopted by one who desires numerous offspring. (Colebrooke, Vol. II, p. 420.)

Sancha and *Lichita*, *Vishnu* and *Harita*:—By a son a man obtains victory over all people; by a son's son he enjoys immortality; and afterwards, by the son of that grandson, reaches the solar abode. (Colebrooke, Vol. II, p. 421.)

Yajnyawalcya:—Through a son, a son's son, and the son of a grandson, the father or ancestor obtains *bliss* in other worlds, immortality and heaven; but the double set of oblations and the funeral cake are offered by a man's own son and other descendants, whether principal or subsidiary. Heaven signifies the solar abode; for the import is the same with that of the preceding text.

Vasishtha:—The endless abodes are allotted to those who leave male issue; it is recorded that "heaven is not for him who leaves no male progeny." Enemies, therefore, pronounce *this curse*:—"May they be childless and become evil spirits." The want of male issue is the great cause of destruction: therefore is a son desired.

It is declared in the *Veda* that heaven is not for him who leaves no male issue. It consequently appears that celestial bliss is attained through a son; and that is made evident by the text of Yajnyawalcya—"The endless abodes, &c." Since the purport is the same, they are allotted to those who have grandsons; the word "son" here signifies offspring in general. It is thus declared that sons and other male descendants are most desirable. The Sage proceeds to show eternity *enjoyed* through the means of a son; childless men become invisible giants or demons; certainly that it is a great evil by which the name of giant or demon is *affixed* to manes, such is the implied sense according to the *Ratnacara*:—"Enemies, &c.," this curse is pronounced by them. (Colebrooke, Vol. II, p. 421.)

Sriti quoted in the Ratnacara:—A son of any description should be anxiously adopted by one who has no male issue, for the sake of the funeral cake, water, and solemn rites, and for the celebrity of his name.

2. Fathers desire sons, dreading lest they fall to a region of horror, and *reflecting whosoever among these sons* shall go as a pilgrim to Gya will convey us beyond those places of torture.

It follows that all manes are carried beyond the regions of horror in consequence only of obsequies performed at *Gya*. (*Vide* Colebrooke's Digest, Vol. II, Bk. V, pp. 419 to 421.)

adopt on the ground, that although such a son offers the funeral cake and libation of water, yet he cannot celebrate the name and perpetuate the lineage of his sonless uncle. (*Vide* Dattaka Chandrika, Sec. I, vv. 21 and 22.)

(A son of any description must be anxiously adopted by a man destitute of male issue.) The passage "by a man destitute of male issue" has been explained to mean a man to whom no son has been born or whose son has died. Dattaka Mimansa, Sec. I, v. 4; Dattaka Chandrika, Sec. I, v. 4.

The term 'son' has been interpreted to include as far as great-grandson; so a man having a son, son's son, or son's grandson cannot adopt.

Now the question arises, whether a man having his son's adopted son can himself adopt one, though the son had adopted a son without his father's consent or knowledge? That a son can, with the knowledge and consent of his father, authorize his wife to adopt, or can himself adopt, has been ruled by the Sudder Court of Calcutta—*Ramkishen Surkhel* v. *Mussamat Srimati Debia* (Sel. Rep., Vol. III, p. 489, new edition). The question that now arises is, whether a son, without the knowledge and consent of the father, can authorize his wife or can himself adopt a son, and thereby defeat the rights of the father to adopt; and if the son so adopted by a son has all the rights of a natural born son—*vide Padma Kumaree Debya Chowdhurany and another* v. *Jagat Kisore Acharji, minor, through Bepin Behari Mukerji, manager, and another* (Shome's Law Rep., Vol. II, p. 229, see also Cal. Law Rep., Vol. IV, p. 538)—how the adoptive grandfather can be allowed to defeat his rights by adopting a son himself, is difficult to understand, seeing that he will, on his death, receive as good a *pinda* from his son's adopted son as from his own adopted son.

In the case published in Vol. III, Select Reports, p. 489, new edition (*Ramkishen Surkhel* v. *Mussamat Srimati Debia*), it has been held by the Calcutta Sudder Dewany Adalut that, in the case of a Hindoo in Bengal dying in his father's lifetime without issue, but leaving a widow authorized to adopt a son, if such adoption be made by the widow with the knowledge and consent of her deceased husband's father, at any time before

he shall have made any other legal disposition of his property, or before a son shall have been born to his daughter in wedlock, no such subsequent disposition or birth shall invalidate the claim of the son so adopted to the inheritance.

I can well understand the reason why the son so adopted should be deprived of the inheritance by a previous legal disposition of the property; but I do not see what reason can be assigned for disinheriting such an adopted son, because a son has been born to a daughter previous to the adoption. If a son be born to a daughter during the lifetime of the owner, can the daughter's son so born defeat the rights of a son's son born after the birth of the daughter's son during the lifetime of the owner and previous to the descent being cast? Certainly not. Why then the poor adopted son should be deprived of inheriting his grandfather's property under similar circumstances? On the consideration of the rulings noted in the margin, Mr. Mayne seems to have come to the conclusion that when inheritance vests on a widow, and she adopts a son, whether on the strength of a formal permission or with the consent of her husband's kinsmen, such a son would take the inheritance in preference to a person or persons who would, but for such adoption, have taken the inheritance after the death of the widow; but she cannot, by adopting a son, defeat the rights of the person on whom the property is already vested. As we shall have to refer to these and other rulings on the subject when we come to consider about the rights of an adopted son and on many other questions connected with adoption, so we do not here quote those rulings in full.

Bhoobanmoye Debya v. Ram Kisore Acharji, Moore's Ind App., Vol. X, p. 279; Suth. P. C. J., Vol. I, p. 577; Raja Velanki Venkata Krishna Rao v. Venkata Rama Lakshmi Narsayya, Ind. App., Vol. IV, p. 1; Rupchand Hindu Mal v. Rakhma Bai, Bom. H. C. Rep., Vol. VIII, A. C. J., p. 114.

Another interesting question here arises as to the effect of Act XX of 1850. According to it, a man is not to lose his rights on account of his renouncing his own religion and embracing another. Can a Hindoo, converted to Christianity or Mahomedanism, adopt a son? I think there being no fear of *Put* to him according to his new religion, he cannot; and besides he is incompetent to perform religious ceremonies neces-

sary for effecting an adoption. But the second question is still more difficult,—*i. e.*, whether a Hindoo, on the conversion of his son to Christianity or Mahomedanism, can adopt a son for the performance of his own and ancestors' *sradha* and other religious ceremonies, and thereby deprive the convert son of his inheritance? On the conversion of the son, the necessity for adoption arises, for he no longer remains competent to perform *sradha*, &c. Mr. Grady suggests that the present difficulty might be overcome by the father's dividing the property with the convert, and then adopting a son, in which case the adopted son would seem to be entitled to succeed to the father's share. I think if it be acceded to that the father is competent to adopt a son on the conversion of his own son begotten in lawful wedlock, then much of the difficulty would cease to exist, for in that case, like a posthumous son, the adopted son may share the inheritance with his convert brother, with this difference that he (the adopted son) shall have to take the share which is allotted to an adopted son in the division of property with a son subsequently born in lawful wedlock. But cannot the convert son urge that his conversion to another religion creates no necessity for adoption, and that, by the very sight of his countenance, his father was saved from the hell *Put*, —*vide* Vrihaspati, cited in Colebrooke's Digest, Vol. II, Book V, Chap. IV, p. 420, *a father is saved from the hell 'Put' by the sight of a son's countenance*,—and that so long he lives, he celebrates his father's name. So the primary two reasons for adoption would seem to be wanting when a convert son exists. It is true that he cannot offer funeral cake and libation of water or perform solemn rites, but the necessity for adoption does not rest on the performance of these spiritual rites alone. For in that case a man ought to have been debarred from exercising the right of adoption when there existed a brother's or a daughter's son. The author of the Dattaka Chandrika, in discussing whether a man having a brother's son living can adopt or not, remarks—"That although by reason of the nephew's pos-" sessing the power of presenting oblation, he may be the means " of procuring *exemption from exclusion from heaven* and so " forth, still, as the *celebration of name* and the *due perpetuation*

" *of lineage* would not be attained, for the sake of the same, the " constituting an adopted son is indispensable." Those who contend that, in the presence of a brother's son, there is no necessity for an adoption, they cite this text of *Menu* :—" If one among " brothers of the whole blood be possessed of male issue, Menu " pronounces that they all are fathers by the means of that son."—Menu, Chap. IX, sloka 182. So it will be seen that the necessity for adoption rests in some cases, as I have said, more on the perpetuation of the lineage and the celebration of the name, than on the performance of religious rites. The convert son may say—let the nearest of the kin perform the religious rites, and I shall take the inheritance by perpetuating the lineage and celebrating the name, as well as by saving my father from the hell (*Put*) by the very circumstance of my birth.* If there be a brother's or daughter's son to perform the *sradha* like a son, there is no necessity for adoption in the presence of the son converted to Christianity. For here he celebrates and perpetuates the name and lineage, and others perform the obsequies.

At one time doubt was entertained, whether a man having a brother's son living could adopt a son. Those who contended that in such a case a man could not adopt, urged that, if in spite of the text of Menu—" If one among brothers of the whole " blood be possessed of male issue, Menu pronounces that they " all are fathers by means of that son" (Menu, Chap. IX,

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* In the case of *Chinna Gaundan and another* v. *Kumara Gaundan* (Mad. H. C. Rep., Vol. I, p. 54), Chief Justice Scotland remarked:—

" It is the son's performance of his father's exequial rites, not his birth or " adoption, that relieves the father from the danger of '*Put.*' Would the " father after the birth or adoption of a son be considered safe from the " danger in question, if those rites were not performed, owing to the son's " death, his loss of caste, or for any other reason? If the mere birth of a " son were all that was required, it would hardly be laid down, as it is, that " on the death of such son the affiliation of another is indispensable." Now, in the presence of this ruling, a convert son cannot boast of saving his father by the very circumstance of his birth, yet if there be daughter's or a brother's son living, he (the convert) may say—let one of them who exist perform the exequial rites of my father, which will be as efficacious as if they have been performed by myself; and let me take the property by celebrating the name and perpetuating the lineage.

sloka 182) — a man having a brother's son living be allowed to adopt, then why the same privilege is taken away from a co-wife, who has given birth to no son to her husband, on the face of a similar text of Menu, *viz.*,—" If, among " all the wives of the same husband, one bring forth a male " child, Menu has declared them all, by means of that son, to be " mothers of male issue " (Menu, Chap. IX, sloka 183). In the Vibadarnava Setoo, translated by Mr. Halhed, Chap. XXI, Sec. 9, the proposition is distinctly stated,—" He who has no son or " grandson or grandson's son or brother's son, shall adopt a son ; " and while he has one adopted son, he shall not adopt a second." This passage has been quoted by the Privy Council in *Rungama* v. *Atchama*. The celebrated commentator Kalluka Bhattya, in commenting on sloka 182, Chap. IX of Menu's Code, observed that, in the presence of a brother's son, uncles have no power to adopt.

" ভ্রাতৃণামেকজাতানামেকশ্চেৎ পুত্রবান্ ভবেৎ!
সর্ব্বাংস্তাংস্তেন পুত্রেণ পুত্রিণো মনুরব্রবীৎ।। "

ভ্রাতৃণামিতি। ভ্রাতৃণামেকমাতাপিতৃকাণাং মধ্যে যদ্যেকঃ পুত্রবান্‌স্যাৎ অন্যেচ পুত্র রহিতাস্তদা তেনৈক পুত্রেণ সর্ব্বান্ ভ্রাতৃণ সপুত্রান্‌মনুরাহ ততশ্চ তস্মিন্‌ সতি অন্যে পুত্র প্রতিনিধয়োন কর্ত্তব্যাঃ সএব পিণ্ডদোঽংশ হরশ্চ ভবতীতানেনোক্তং এতচ্চ পত্নীদুহিত-রশ্চৈব পিতরৌ ভ্রাতরস্তথা। (মনু ৯ অধ্যায় ১৮২ শ্লোক)

But this proposition, that a man having a brother's son living cannot adopt, has been overruled by the Dattaka Chandrika and other works of similar authority ; and it is settled now, that a man having a brother's or daughter's son living can adopt a son for himself.

Whether a man having a brother's son living, and capable of being adopted, can adopt another, shall be discussed in another chapter.

There was some difference of opinion as to the power of a leper to give or receive a son in adoption. Macnaghten reports two contradictory decisions, in the first of which the Pandit who was consulted declared that a person afflicted with leprosy is incompetent to adopt a son, for he bears the impurity till death. But in the second, the opinion was to the effect, that " after " performance of the prescribed penance, a person afflicted with

" leprosy becomes purified, and he is competent to perform *Par-* " *vana* as declared in the Veda, therefore the adoption made by " the person so purified is good and legal."

The latter opinion is regarded by Macnaghten as the correct one. Mr. Sutherland, in his Synopsis (note 4), attempted to show that the author of the Dattaka Chandrika and the Mitacshara did not prohibit the adoption by a person disqualified to inherit on account of leprosy. They simply denied the right of one so adopted to inherit of his adoptive grandfather. In my opinion, in all cases in which a man's disqualification for inheritance may be removed by penance, he, after the performance of such penance, ought to be allowed to adopt; and sons so adopted ought to be entitled to inherit his adoptive grandfather and the rest to whom the ordinary adopted sons are heirs,—at any rate the son so adopted ought to be allowed to inherit his adoptive father.

Baboo Sayama Charan Sirkar also requires such penance—*vide* Vyavastha Darpana, p. 757, English edition.

The late Justice Shambhu Nath Pandit, in the case of *Ananda Mohan Majumdar* v. *Govind Chunder and others* (Suth. W. R., from January to July, 1864, p. 173), ruled, that a leper could legally give his son in adoption. The right of a leper to receive a son in adoption has also formed the subject of discussion in this case. I think penance is necessary only when the disease is of a very virulent and aggravated type, for it has been held by the Bombay High Court, that it is only when leprosy assumes a virulent and aggravated type that it is by the Hindoo law made a ground of civil disqualification—*Janardan Pandu Row* v. *Gopaland Vasudeb Pandu Row* (Bom. H. C. Rep., Vol. V, A. C. J., 145).

Baboo Sayama Charan Sirkar is of opinion, that the impotent and the rest, though incapable of inheriting, are capable of adopting; and the learned author further holds that, according to the Dattaka Chandrika, such adopted sons have no right to inherit the estate of their paternal grandfathers except to maintenance only. (*Vide* Vyavastha Darpana, Vol. II, p. 858, Bengalee edition.)

In my opinion, as in the case of lepers, those (adopted) sons ought to be allowed to inherit their adoptive father's property.

There is some difference of opinion as to the power of a

widower to adopt a son. Justice Strange, in his Manual of Hindoo Law, denies the right of a widower to adopt, but he is opposed by such a host of authorities, as Sir Thomas Strange, Macnaghten, Colebrooke; see Sutherland's Colebrooke's Digest, Vol. III, p. 252; Sutherland's Synopsis of the Hindoo Law of Adoption, note iv; Macnaghten, Chap. VI, p. 69, new edition; Sir Thomas Strange's Hindoo Law, Vol. I, p. 65, edition 1825. The Madras High Court, after considering all the authorities on the subject, has held, that a widower can make a valid adoption according to the Hindoo law, and that the Hindoo law does not prohibit a man who has not been married to adopt—*N. Chand Vasik Haradan and another* (appellant) v. *N. Brahmanna, minor, his father Chinna Jagannadhan* (respondents) (Mad. H. C. Rep., Vol. IV, p. 270); and *Naggappa Addappa* v. *Subhasatri* (Mad. H. C. Rep., Vol. II, p. 367).

We have shown the theory on which Hindoo adoption is based, and we have also shown that a man destitute of a son can adopt a son. Now we have to enquire whether the terms, destitute of a son, *aputtra*, *i. e.*, sonless, are to be limited to a failure of sons of the body, or is to be extended so as to include the representative of such sons as well as the other substitute sons given in Menu's texts.

It must be remembered that the term 'son' (*puttra*) is held to include not only the son, but also the grandson and great-grandson, on the ground that these equally with the son present oblations of food, and preserve the line,—*vide* Dattaka Chandrika, Sec. I, placita vi. The Mitacshara and the Dayabhaga extend the right of representation to the great-grandson in matters of inheritance; and the Mitacshara, according to which the father and the son have equal rights over the ancestral property, permits the grandson, in the absence of a son, to challenge an unauthorized alienation of ancestral property on the part of the grandfather—*Madan Gopal Thakur* v. *Ram Baksh Pandit* (W. R., Civ. Rul., Vol. VI, p. 71), and *Kantu Lal* v. *Gree Dhari Lal* (W. R., Vol. VI, p. 496); see Mitacshara on Inheritance, Chap. I, Sec. V., para 9. It seems clear that not only the party wishing to adopt must have no son of the body living at the time of adoption, but that there must also be a failure of the issue of such son in the male line

as far as the great-grandson. Before the decision in the celebrated case of *Rangma* v. *Achma* (Suth. P. C. Judgment, Vol. I, p. 197) there used to be much discussion among the pandits and lawyers of the time as to the legality of the second adoption effected in the lifetime of the first adopted son. In the case of *Gouri Prasad* v. *Jay Mala* (S. D. A. R., Vol. I, p. 136) it appears that the husband, after adopting a son in conjunction with one of his wives, had confirmed his permission already given to another wife to adopt, and the adoption made under such permission during the existence of the son already adopted was declared valid by the Sudder Court. But this ruling was rejected by the Privy Council in the celebrated case of *Rangma* v. *Achma* (Suth. P. C. Judgment, Vol. I, p. 197).

This was an appeal from the Sudder Dewany Adalut of Madras, and it was held by the Privy Council that, according to Hindoo law, a second adoption (the first adopted son still existing and remaining in possession of his character as a son) is invalid. The acquiescence of the first adopted son, after he came of age, in the division of property made by the adoptive father between his adopted sons, was not equivalent to a previous consent (binding on the first adopted son) to the disposition of the ancestral property by the father; but was binding on the first adopted son with regard to other property of which the father had the power of disposing by an act *inter vivos* without the consent of the first adopted son.

In spite of the ruling above cited, a further attempt to revive the question was made in Bengal in 1865 in the case of *Manmatha Nath Dey* v. *Anath Nath Dey* (Bourke's Rep., p. 189, O. J.) In the Bengal case the contention was, whether simultaneous adoption of two children was valid; and this contention was based partly on the doubtful text of Menu, "that many sons are to be desired that one may travel to *Gaya*, and that he who has only one son is to be considered childless;" and partly on the authority of Jagannatha, a modern writer on Hindoo law, and on an old precedent (S. D. A. R., Vol. I, p. 136) of the Sudder Dewany Adalut. But Phear, J., by an able judgment, clearly held that twin adoption was wholly void as creation of an heir. In *Bhaya Ram Singh* v. *Aghor Singh and others*, it was ruled by

the N. W. P. High Court (Vol. I), that the adoption of two persons as sons at the same time is not only unusual, but also a practice not sanctioned by the Hindoo law—*vide* Rattigan, p. 12.

In *Manmatha Nath's* case the adoptive father had bequeathed his property in equal moieties to his two adopted sons; and it was held that the power of a Hindoo of Bengal to dispose, either by deed *inter vivos* or by will, of all his property, ancestral or acquired, extends equally to distributions in regard to time and persons, and the residue given to the (supposed) adopted son was a sufficient designation to support the bequest; also that the direction for a substitutive adoption in case either of the first (abortively) adopted sons should die without issue, and for succession to the share of such deceased son, was valid.

But in the case of *Srimati Shidheshvari Dasi* v. *Durga Charan Set and others* (Bourke's Rep., p. 360, O. J.), where one Dayal Chandra, after adopting two sons, had executed a will, which, after reciting the fact of adoption, proceeded to say:—"According to our *shastra* the said two adopted sons will perform our obsequies and shall become heirs, successors to our ancestral and self-acquired property,"—it was held, that when a "legatee does not possess the character under which the gift was made, then if either that character was assumed in deception of the testator, or it is reasonably clear that the testator would not have made the gift had it not been for the supposed existence of that character, the Court will construe the mention of the character as imposing a condition precedent to the gift."

Justice Phear remarked, that "the language of the will above referred to merely amounts to a statement of the course of events which law and custom will bring to pass. But assuming it to have been the intention of the testator by these words to make a substantive gift, it seems to me clear that the gift was purposely made to wait upon the character of the donee. The character of the adopted son and the capacity to perform the obsequies are evidently moving considerations for the gift."

There is much difference of opinion as to a widow's power to effect an adoption. According to the Dattaka Mimansa a widow is incompetent to adopt, though authorized by her hus-

band. Bachaspati Misri is of the same opinion. The author of the Dattaka Mimansa, feeling the hard consequences of such absolute prohibition, has allowed the kritrima form of adoption on the authority of Parasara: Dattaka Mimansa, Sec. I, v. 65. So in the province of Mithila, where the Dattaka Mimansa is the paramount authority, the form of kritrima adoption is still prevalent. The legal rights of a kritrima adopted son, and also whether such a form of adoption ought to be allowed in Bengal, will be discussed in another chapter.

The Madras High Court and the Privy Council, in the celebrated *Ram Nad* case (*vide* Suth. P. C. Judgment, Vol. II, p. 135), have, after considering all the authorities on the subject, come to the conclusion that there is enough of positive authority to warrant the proposition that, according to the law prevalent in the Dravira country, a Hindoo widow, not having her husband's permission, may, if duly authorized by her husband's kindred, adopt a son to him (*vide Collector of Madura* v. *Mutta Ramlinga Sathapati*, Suth. P. C. Judgment, Vol. II, p. 135; Mad. H. C. Rep., Vol. II, p. 206). This ruling was followed in the case of *Rajah Vellanki Venkata Krishna Rao* (Ind. App., Vol. IV, p. 1), with this innovation, that it would be dangerous to introduce into the consideration of adoption cases nice questions as to the particular motives by which the widow was influenced to exercise the power of adoption, so long as they are neither corrupt nor capricious motives operating on the mind of the adoptive widow. In another Madras case, the Privy Council, after having approved the dictum laid down in the *Ram Nad* case, held, that although, according to the law of Madras, a widow not having her husband's permission may adopt a son to him, if duly authorized by his kindred, yet the requisite authority is, in the case of an undivided family, to be sought within the family, even though the particular property devolving upon the adopted son is to be held in severalty, and not in coparceny—*Bhima Deo Raja* v. *Kundana Debi* (Ind. App., Vol. III, p. 154).

Whether a Hindoo widow in Bengal can adopt without the permission of her husband, has been discussed in another chapter, and there all the authorities on the subject have been enquired

into at great length, so I do not wish to lengthen the subject here. But I cannot omit to remark that if a poor widow is allowed to adopt a son with the consent of her husband's kindred, she ought not to be made dependent for this on any particular person; if it be held that the nearest kinsman's consent is necessary, I do not know why he should give it, since, on the widow's death, he is the most likely man to inherit the property.

I think their Lordships of the Privy Council, in requiring such consent, have been influenced by the rule of the Hindoo law which provides that an alienation by a Hindoo widow for reasons other than sanctioned by the Hindoo law, is void unless assented to by the immediate reversioner.

The principle upon which any assent was necessary appears to be, that females, on account of their supposed mental weakness,* are always under tutelage, and are incapable of performing any important act without the advice and the assent of a male relation. This advice and assent may be given by one as well as by many, and by a divided member of the family as well as by an undivided member. The assent is not required as a waiver of the right of the assenting party, but as evidencing the opinion of a masculine mind that the act is in itself a proper one. If the assent of the nearest heir is necessary, then that assent should never be given, and the whole doctrine of adoption by a widow would become nugatory; though that doctrine is founded upon the duty of procuring the most efficacious performance of her husband's funeral rites.

Mere unchastity on the part of a widow does not divest her of

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* Read the remarks of the Madras High Court in *Ram Nad* case, in p. 230, Vol. II, Mad. H. C. Rep., where the arguments of the Dattaka Kaustabha, showing that no assent of kinsman is necessary for a valid adoption by a widow, are quoted—"The guardianship described to exist is merely intend-"ed to provide as that of the father before marriage, was against the per-"formance of improper acts, but seeing that the act of adoption is one "plainly enjoined and obligatory, no dissent of kinsmen can prevent the "widow from doing it, and their assent is not needed. That adoption is "upon the footing of other spiritual duties for which she does not require "permission, and which, no dissent of guardians could prevent her from "performing or justify her in not performing."

property which has once become vested in her—see Weekly Reporter, Vol. XIX, p. 367; but in the case of *Syam Lal Dutt* v. *Saudamini Dasi*, the question was, whether an unchaste woman, who was living in concubinage, and was pregnant from such concubinage, was competent to receive a son in adoption under a power of adoption from her husband; and the Court was of opinion that, under the circumstances, a Hindoo widow becomes incompetent to adopt. (May 31st, 1870; *vide Englishman*, June 27th, 1870; B. L. R., Vol. V, p. 362.) This ruling is, no doubt, consistent with the Hindoo law, but if the principle laid down here is meant to be observed in all cases, I think, ninety-five per cent. of the Hindoo adoptions made by widows would be set aside. I think, the principle was intended to apply only to extreme cases like the one already mentioned.

The fact of the widow's minority has been held to afford no valid objection to an adoption effected under permission from her deceased husband—*Hara Dhan Roy* v. *Bishva Nath Roy* (Macnaghten's Precedents, Vol. II, p. 180). But whether a male minor can himself adopt or give permission to his wife is a question in which there is much difference of opinion. A minor whose property is under the management of the Court of Wards, cannot give permission to his wife without the permission of the said Court. The law on this subject stands unaltered from 1793. We have to enquire now as to the power of minors other than those under the Court of Wards. Pandit Bharat Chandra Shiromany, the writer of the Commentary on the Dattaka Chandrika and Dattaka Mimansa, says in his Synopsis to the Dattaka Mimansa, that both male and female infants may adopt sons, infancy not being a bar to the performance of religious rites. Baboo Prasanna Kumar Tagore, who seems to have been always against the law of adoption, has held, that a minor is incompetent to adopt. He has assigned the following reasons for it:—

"Adoption is not a *nittya dharma*.* It is optional. So a minor, who is supposed to have no discretion, ought not to be allowed to adopt; and any authority given by a minor to adopt,

* *Nittya dharma* means those religious rites the nonperformance of which brings a sin upon the person who does not perform them.

like any testamentary writing, or verbal bequest made by him is invalid according to Hindoo law."

Pandit Bharat Chandra Shiromany, on the other hand, holds that adoption is of such paramount spiritual necessity that a minor even ought to be allowed to adopt, for a son from his very birth is bound to pay his paternal debts.

The texts cited in the beginning of this chapter, specially the one—"a son of any description should be anxiously adopted by one who has no male issue"—clearly goes to show that adoption is regarded by all the text-writers as a positive act of religion, incumbent on a Hindoo who seeks to preserve his soul from the unknown torments of "Put," and the act is one which is declared by all the ancient Hindoo writers to be attended with certain spiritual benefits not otherwise obtainable.

The Privy Council laid down that a minor, who has attained the age of discretion under Hindoo law, is competent to authorize his wife to adopt, and needs not seek the consent of his guardian,—*Jammuna Dasi Chowdrany* v. *Bama Sundary Dasi Chowdrany*, W. R., Vol. XXV, p. 235; but see page 239, where their Lordships remarked:—"We have the judgment of Mr. Justice "Mitter to the effect that where a minor is not under the Court "of Wards, but has attained years of discretion according to the "Hindoo law, he is capable of executing such an instrument as "this."

An adoption is not invalidated by the mere fact of the adoptive father being a minor, if he has attained the years of discretion. Such an adoption is not attended by any civil disability —*Rajendra Narain Lahoree* v. *Saroda Sundari Debia* (W. R., Civ. Rul., Vol. XV, p. 548).

The sound opinion seems to be that which would allow a a minor, without putting any limit to the age, to adopt or give permission for adoption, if it be proved that at the time of doing the act he has attained sufficient discretion.

It would certainly be foolish to accord this privilege to an infant of five years, and it will be equally so to take it away from a minor who has attained the age of 14 years or something like it. Mr. Rattigan is of opinion that the very existence of a statutory law that minors under the Courts of Wards can

neither adopt nor authorize their wives to do the same unless assented to by the Court of Wards, supplies additional arguments in support of the proposition that the Hindoo law permits a minor of sufficient discretion to adopt, for if an adoption by such a person was itself illegal, there was no need to enact that without the consent of the Court of Wards no adoption by disqualified landholders was to be deemed valid.

CHAPTER II.

WHO CAN GIVE A SON IN ADOPTION.

THE law on this subject is thus stated by the ancient sages and commentators on the Hindoo law :—

" মাতা পিতা বা দদ্যাতাং যমদ্ভিঃ পুত্ৰমাপদি।

সদৃশং প্ৰীতি সংযুক্তং সজ্ঞেয়ো দত্ৰিমঃ স্মৃতঃ ॥"

(মনু ৯ অধ্যায় ১৬৮ শ্লোক)

" He, whom his father or mother gives to another as his son, provided that the donee have no issue, if the boy be of the same class and affectionately disposed, is considered as son given." (Menu, Chap. IX, sloka 168.)

Sir William Jones, in his translation of Menu, inserts in *italics*, after the word 'mother' in that text, the words " with her husband's assent," a gloss apparently of the celebrated commentator Kalluka Bhattya.

Sir William Jones translates the above text of Menu thus :— " He, whom his father, or mother, *with her husband's assent*, " gives to another as his son, provided the donee have no issue, if " the boy be of the same class (*gotra*) and affectionately disposed, " is considered as the son given. *The gift being confirmed by " pouring water.*" The *italicised* portion is from Kalluka Bhattya's Commentary (Menu, Chap. IX, v. 168; Colebrooke's Digest, Vol. II, Book V, Chap. IV, Sec. 8, v 275, p. 398). Kalluka Bhattya holds, that the father and mother should make the gift with mutual consent. Bachaspati Misri likewise affirms, that adoption is only valid, if the gift be jointly made by both parents (Colebrooke's Digest, Vol. II, p. 399). Kalluka Bhattya,

on the authority of Vasishtha, thus commented on sloka 168 of Menu, Chap. IX :—

"মাতেতি শুক্রশোণিতসম্ভবাঃ পুরুষোমাতাপিতৃনিমিত্তকঃ তস্য প্রদান বিক্রয় পরিত্যাগেষু মাতা পিতরৌ-প্রভবতইতি বশিষ্ঠস্মরণাৎ মাতা পিতা বা পরস্পরানুজ্ঞয়া যং পুত্রং পরিগ্রহীতুং সমান জাতীয়ং তস্যৈব পুত্রাভাব নিমিত্তায়ামাপদি প্রীতি যুক্তং নতু ভয়াদিনা উদক পুর্ব্বং দদ্যাৎ স দত্রিমাখ্যঃ পুত্রো বিজ্ঞেয়ঃ।"

The author of the Mitacshara writes thus on the subject :—" He, " who is given by his mother with her husband's consent, while " her husband is absent, or incapable though present, or without " his assent after her husband's decease, or who is given by his " father or by both, being of the same class with the person to " whom he is given, becomes his given son (*dattaka*)." So Menu declares,—" he is called a son given, *dattrima*, whom his father " or mother affectionately gives as a son being alike (by class), " and in a time of distress, confirming the gift with water." (Mitacshara, Chap. I, Sec. 11, v. 9.)

Madana, another authority, thus commented on the text (168, Chap. IX) of Menu, which has been already cited above :—

"বা শব্দাত্তু মাচ ভাবে পিতর দদ্যাত্তু, পিত্র ভাবে মাতৈব ; উভয় সত্ত্বেতুউভাবপীতি,"

" The disjunctive 'or' means that, if the mother be not present, " the father alone may give him away, and if the father be dead, " the mother the same ; but if both be alive, then even both."

The author of the Dattaka Chandrika treats the question thus :—" In answer to the question by whom is a son to be " given, Sanauca declares :—' By no man having an only son " is the gift of a son to be ever made. By a man having several " sons, such gift is to be anxiously made' " (Placitum xxix, Sec. 1, Dattaka Chandrika). See placitum xxx also, which would clearly invalidate the adoption of an only son.

" But by a woman, the gift may be made with her husband's " sanction, if he be alive, or even without it, if he be dead, have " emigrated, or entered a religious order. Accordingly, Vasishtha :— " ' Let not a woman either give or receive a son, unless with the " assent of her husband.' " (Placitum xxxi, Sec. 1, Dattaka Chandrika.)

"Now, if there be no prohibition, there is assent, on account "of the maxim—the intention of another not prohibited, is "sanctioned. Yajnyawalcya suggests the independency of the "woman—'he, whom his father or mother gives, is a son given,' "also in another place—'deserted by his father and mother or "either of them'" (Placitum xxxii, Sec. 1, Dattaka Chandrika.)

The author of the Dattaka Mimansa holds that a widow can neither give nor receive a son in adoption, for after the death of her husband it becomes impossible for her to receive his consent as ordained by Vasishtha (Dattaka Mimansa, Sec. I, placita xv, xvi, xvii, and xviii). But the said author, in a season of calamity, accords to the widow the privilege of giving one of her sons in adoption, for by referring to the instance recorded of Galava, such gift may be inferred as legal (Dattaka Mimansa, Sec. IV, placitum xii). Bachaspati Misri maintains that the passage of Vasishtha—"Let not a woman either give or accept a son unless with the assent of her husband"—refers only to the "gift and not the adoption of a son." According to the said author, a woman cannot, even with the permission of her husband, adopt a son.

Now we have laid before our readers all the original authorities and commentaries on the question—Who can give a son in adoption? and in our humble opinion the following deduction is drawn from them:—(1) that the father and mother should make the gift with mutual consent; (2) that the father can give away his minor son without the assent of the mother; (3) that the mother is generally incapable of making such a gift during the lifetime of the father without his consent; (4) that she, however, on her husband's death, may give in adoption her minor son, and even during the lifetime of the husband, if he have emigrated or entered a religious order, when the absence is incompatible with the interchange of letters by post. (Ind. Law Rep., Vol. II, Bom. Series, p. 377.)

The text of Menu and Yajnyawalcya read with the opinion of Devendra Bhattya, clearly support the above theory. The Mitacshara also gives the privilege to the mother after the death of the father. Now we would ask our readers whether there is any authority whatever to support the dictum of our infallible Macnaghten "that a woman in Bengal and Benares can

neither adopt a son,* nor give away her son in adoption, without the permission of her husband"—(Macnaghten's Hindoo Law, p. 108). Fortunately, the accute mind of Baboo Sayama Charan Sirkar perceived the illegality of the rule laid down by Macnaghten. Baboo Sayama Charan states that what Macnaghten stated was not the law of Bengal (Vyavastha Darpana, English edition, p. 762, foot-note). At any rate, there is nothing in the authorities to indicate that the law laid down by our *Rishis* is different for Bengal. The author of the Dattaka Chandrika, whose opinion prevails in Bengal in adoption questions, has, in clear terms, accorded to a woman the right of giving her son in adoption after the death of her husband. It may be argued that when Vasishtha ordains—"nor let a woman either give or accept a son unless with the assent of her lord"—how she can do so in the face of this express prohibition. In the first place, we may disregard this prohibition as being opposed to Men'u's text (*vide* Chap. IX, 168, and Yajnyawalcya, quoted in Dattaka Chandrika, placita xxxi, xxxii, Sec. I), where the father or the mother is declared competent to give a son in adoption. For it is one of the first principles of the Hindoo law laid down by Vrihaspati that the laws inconsistent with Menu ares not to be respected:—

মন্বর্থ বীপরিতার্যা সা স্মৃতির্নঃ প্রসসাতে (বৃহস্পতী।)

Now let me proceed to consider whether Vasishtha is really inconsistent with Menu and Yajnyawalcya. The text of Vashistha alluded to begins thus: "A son formed of seminal "fluids and of blood proceeds from his father and mother as an "effect from its cause; both parents have power for *just reasons* to "give, to sell, or to desert him" (Colebrooke's Digest, Bk. V, Chap. IV, Sec. 8, Vol. II, p. 387, v. 273). Then a little after we find this passage,—"Nor let a woman either give or receive a son unless with the assent of her lord."

In the beginning, we find *both parents*—that is, father and

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* *Note.*—In this Chapter we do not cite any authorities against Macnaghten as regards the *adoption* of a son by a widow, as we have treated the subject separately. The phrase "*can neither adopt a son*" has been put in simply to give Macnaghten's opinion on the whole subject in his own words, and to keep the integrity of the quotation.

mother—have the power of giving, selling, or deserting their son, and a few lines after, a woman is told not to "give or accept a son without the consent of her husband:" thus we find an inconsistency in Vasishtha himself. But he becomes very consistent if we interpret the text thus,—that a mother, after the death of the father, becomes competent to give, to sell, or to desert her son; but that a woman during the lifetime of her husband cannot exercise that power. By this interpretation we do not only make Vasishtha consistent with himself, but he becomes supported by the text of Menu—"he, whom his father or mother gives to another," &c. (Chap. IX, sloka 168, Menu). The author of the Dattaka Chandrika also, in clear terms, holds, though on the ground of implied consent, that a woman may give her son in adoption, even without the consent of her husband, if he be dead, have emigrated, or entered a religious order: we are bound, for the sake of consistency, to interpret the term woman, as used in Vasishtha's text, as conveying a meaning not including the mother after the death of the father. For, in the beginning of the text, we find both parents have the power to give, to sell, or to desert their son. What other interpretation can be put upon the term *woman* than that it means a *woman during her husband's lifetime;* and by this interpretation we preserve the meaning and force of the whole text, and, as I have already said, render it consistent with Menu and Yajnyawalcya. Now we ask our readers, whether we are bound to follow Macnaghten or the author of the Dattaka Chandrika, who has been declared by a uniform course of the rulings of the highest Courts of India and those of the Privy Council to be paramount authority in Bengal.

In the case of *Ranga Bai* v. *Bhagritha Bai* (Ind. Law Rep., Vol. II, Bom. Series, p. 377), it has been conceded that Devendra Bhattya, author of the Dattaka Chandrika, accords to a widow the power of giving a son in adoption; and it has been held that though a widow can give a son in adoption, yet a married woman cannot do so against the will, expressed or implied, of her husband, the father of that son, or under circumstances from which the husband's dissent can be inferred. In the case of *Narayan Bavaji* v. *Nana Manahar*, the question was, whether a woman during her husband's lifetime could receive a son in adoption

without her husband's consent; and the authorities, including the Dattaka Chandrika, therein cited, did clearly go to show, that a wife could not either give or receive a son without her husband's consent; but that a widow might do so, provided she had not been prohibited (*vide* Bom. H. C. Rep., Vol. VII, A. C. J., p. 153). In this case also it has been admitted that the Dattaka Chandrika does, in clear terms, accord to a woman the right of giving her son in adoption after her husband's death or emigration, &c., as stated in placitum xxxi, Sec. I, Dattaka Chandrika. So it will be seen that, as far as Bengal is concerned, there is not a particle of authority to support the rule laid down by Macnaghten that a *woman cannot give her son in adoption.*

In the case of *Debi Doyal and another* v. *Hur Hur Singh* (Sel. Rep., Vol. IV, p. 407, new edition), these objections were raised against the validity of the adoption,—

"1*st.*—That Hur Hur Singh was the only son of his father.

"2*nd.*—That he was given in adoption by his mother after "the death of his father without any authority for such act.

"3*rd.*—That the prescribed ceremonies were not duly ob "served at the time of the adoption.

"These facts were not disputed by the respondent, and the "case was referred to the Court's pandits for their opinion. "They replied that the fact of Hur Hur Singh being an only "son was sufficient to invalidate the adoption; and the viola- "tion of this law was a criminal act on the part of both giver "and receiver. In bar to this, the respondent filed another "*vyavastha*, signed by very respectable pandits, from which it "appeared that when a mother from the pressure of want gave "her only son to another person on the special conditions that "her son thus given should perform the funeral rites and "inherit the estates of both his natural and adoptive father, the "adoption was valid, and the adopted son was called *dwyamu- "shyayana.* The presiding Judge, W. Gorton, decided that, though "there was no express evidence to the execution of a con- "tract such as described by the defendant, yet that there could "be no doubt of the adoption and of its having been long recog- "nised, which afforded sufficient presumption of its having been

"legally performed. He, therefore, affirmed the decree of the "City Court."

"From this decision the appellant preferred a special appeal "to the Sudder Dewany Adalut. The respondent, though re- "peatedly summoned, failed to appear or defend his case, and "the proceedings were, therefore, held in his absence. After going "through the documents in the case, Mr. Sealy referred them "to the Hindu law officers for their opinion as to the legality "of the adoption under the circumstances there proved. The "*vyavastha* they gave was to the following effect:—'It appears "'that Hur Hur Singh was the only son of his father, and "'that, after his father's death, he was given by his mother "'as a *dattaka* son, that being the meaning of the term "'*ras nusheen*; such being the case, the adoption of Hur Hur "'Singh by Ram Newaz Ray is invalid, because the adoption "'of an only son is prohibited in the *shastras*, and because "'a woman is prohibited from giving her son in adoption "'without the permission of her husband.' The *vyavastha* "filed by the respondent in the Provincial Court, as confirmed by "the pandits of that Court, declares, that if a woman, unable to "support her only son, were to give him away, on condition that "he should perform the funeral rites for both father and mother, "such son would become *dwyamushyayana*. But this is in- "applicable to the present case, because in all the documents there "is no mention of such a stipulation, and because there is no "precept in the *shastras* which enables a woman to give her son "as a *dwyamushyayana* without authority from her husband, "and no authority appears to have been given in this case."

I admit the correctness of the rule that an only son cannot be given in adoption, but I deny that a woman is prohibited from giving her son in adoption without the permission of her husband. The authorities cited before (*viz.* Menu, sloka 168, Chap. IX; Dattaka Chandrika, Sec. 1, placitum xxxi; Mitacshara, Sec. 11, v. 9, pp. 69, 70, 71, & 72) clearly go to show that a woman, after her husband's death, *can, without his assent*, give her son in adoption; and that the prohibition in Vasishtha's text refers to a woman during the lifetime of her husband, *i.e.*, a *wife*. I admit that there is no express provision in the law authorising a

widow to give her only son in adoption in the *dwyamushyayana* form; but as the authorities cited above clearly accord to her the same privilege with respect to the giving of a son as given to a father, I think she is competent to give her only son in adoption in the *dwyamushyayana* form under the same circumstances under which a father can give him. With regard to that portion of the judgment which was perhaps accepted as authority by Macnaghten to support his dictum that a widow cannot give her son in adoption without the permission of her husband, I need only remark that it is founded on the *vyavastha* given according to verse 15, Sec. 1 of the Dattaka Mimansa, which has no application in Bengal when opposed to the Dattaka Chandrika. According to the former, a widow can neither give nor receive a son even with the previously obtained permission of her husband—a proposition so very singular and hard that no other school except that of *Mithila* accepted it as a law. The Mitacshara was perhaps cited in the judgment in *Debi Dayal's* case to show that an only son cannot be given. The first portion of the passages clearly prove the independency of the mother after the death of the father (Sel. Rep., Vol. IV, p. 407, but see p. 409; Mitacshara, Chap. I, Sec. XI, pp. 69 to 72).

Sutherland in his Synopsis extracts the following principles as best supported by authority:—

1. "That the father may give away his minor son (of course one of several sons) without the assent of the mother, though it is more laudable that he should consult her wishes.

2. "That the mother is generally incapable of such gift while the father lives.

3. "That she, however, on her husband's death, may give in adoption her minor son, and even during the life of that person, in case of urgent distress and necessity. A man who had permanently emigrated, entered a religious order, or become an outcaste, being civilly dead, would be regarded as virtually deceased."

It seems Sutherland has adopted the principle laid down in the Dattaka Chandrika (*vide* Sec. I, vv. 31, 32). If the learned translator had carefully considered the slokas 31 and 32 in connection with verse 7, he would have seen that the prin-

ciple on which a mother was declared competent to give her son in adoption without her husband's consent, was equally applicable to her receiving a son.

It is not at all unlikely that this ruling (*Debi Dayal's* case) was accepted by Macnaghten as his authority for saying that a woman in Bengal cannot give a son in adoption.

A child can only be given in adoption by one who exercises paternal power over him; therefore it follows, that one brother cannot give another brother in adoption, for brothers stand in equality (Considerations of Hindu Law, pp. 207, 208; and Strange's Manual of Hindu Law, Sec. 97), and an uncle is also incompetent to give a nephew in adoption—Strange's Manual, Sec. 80. It has been recently ruled by the Bombay High Court that a brother cannot, with the permission of his father or mother, give in adoption another brother,—*i.e.*, parents cannot delegate the authority to another person so as to validate a gift by him made after their death.

It was also held that an adoption of a son self given, although he may at the time of gift be an adult, is in the present age (*Kali Yoog*) invalid—*Bashitrappa Bin Baslingappa and another* v. *Shiblingappa Bin Ballappa* (Bom. H. C. Rep., Vol. X, p. 268). In this case also, on the authority of the Mitacshara and Menu, it was held, that a valid gift in adoption could be made only by the natural father or mother of the son given, or by them both jointly.

CHAPTER III.

WHO IS TO BE ADOPTED?

THE first rule on this point is, that no boy can be adopted to whose mother the adopter could not have been married, and, according to this rule, daughter's sons and sister's sons are not fit to be adopted, for the adoptive father could not marry his own daughter or sister. But the rule seems to have been quite misunderstood in *Digambari Debya* v. *Taramony* (Macnaghten's Considerations of Hindu Law, p. 170; Rattigan on Adoption, p. 142). In this case it seems to have been held, as it appears from Mr. Rattigan's work, that the adoption by a Brahmin widow of her uncle's son was considered invalid by the Supreme Court of Calcutta, on the ground that she could not be his mother unincestuously. Mr. Rattigan says, that the same principle was followed in the cases noted below.*

The rule laid down by the Supreme Court is clearly wrong. It needs to be seen only whether the adoptive father could marry the boy's mother while she was in an unmarried state. The fact that the adoptive mother could not be married to the man who gives the boy in adoption, is no legal bar to adoption. But according to the author of the Dattaka Mimansa, the adoption of a brother's son by a sister, or a sister's son by a brother, cannot take place—Dattaka Mimansa, Sec. II, v. 34, and Sec. V, v. 17; Vyavastha Darpana, p. 832. No one can deny the correctness of the second proposition, *viz.*, a sister's son cannot be adopted by a brother; but I have much doubt as to the legality of the first proposition, *viz.*, a brother's son cannot be adopted by a sister.

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* *Kora Sankar Tagore* v. *B. B. Manni*, East's Notes, Case 20; Morley's Digest, 18; *Lakhi Nath Rai Kaleyah* v. *Bhinna Bai*, N. W. P., Vol. VII, 441, 443.

It must be remembered that when a woman adopts a son she does so as the representative of her husband. Could there be any legal bar for the husband of the sister to marry her brother's wife while she was in her unmarried state? at any rate the first proposition does not come within the first prohibition, so it appears the learned author assigned a special reason for it,—*vide* Sec. II, v. 34.

Like brothers, a sister can adopt her uterine sister's son (Dattaka Mimansa, Sec. IV, v. 34).

A brother-in-law (salak, শ্যালক) can also be adopted, for during the virginity of his mother, she could be married to the man who married her own daughter. As an instance of this, I need only cite the case of the late Maharajah of Burdwan. The late Maharajah Mahatap Chand was adopted by either Maharajah Tej Chandra himself, or by one of his wives. This Maharajah, Tej Chandra, previous to Mahatap Chand's adoption, was married to the famous Rani Basanta Kumari, a sister of the late lamented Maharajah. The rule has been correctly understood in this spirit in the case of *Mirna Mayi Debya* v. *Bijoy Krishna Goshami* (W. R., Sp. No., p. 121). There the question was, whether the adoption of a grand-nephew was valid, and the Calcutta High Court held that there could be no reason whatever why the respondents should not have lawfully married his nephew's wife, the mother of the adoptive boy, previous to her marriage with the boy's father (W. R., Sp. No., p. 122).

The rule regarding the adoption of a sister's son does not apply to *Sudras** (W. R., Vol. XII p. 356); neither does it apply to the kritrima form of adoption, nor to the adoption of a sister's son by a *vaishya* caste,—*i. e.*, one of the three superior tribes. The adoption of a sister's son by a *vaishya* caste was upheld by the Privy Council—*vide Ramlinga Pillai* v. *Sada Sib Pillai* (Moore's Ind. App., Vol. IX, p. 506). The Bombay High Court, following the above Privy Council ruling, has held, that the adoption of a sister's son by a Hindoo of the *vaishya* caste is valid—*Gana Patrav Vireshver* v. *Vithoba Khandappa* (Bom. H. C. Rep., Vol. IV, p. 130, A. C. J.; see also *Jivani Bhai* v. *Jivu Bhai*

* *Vide* Dattaka Mimansa, Sec. II, v. 74; Dattaka Chandrika, Sec. I, v. 17; Vyavastha Darpana, p. 832.

(Mad. H. C. Rep., Vol. II, p. 462), where the Court has expressed a strong opinion that the adoption of the son of a person whom the adopter could not have married, is invalid according to Hindoo law.

In the well-known case of *Narasammai* v. *Bala Rama Charlu* (Mad. H. C. Rep., Vol. I, p. 420), Mr. Justice Hollway of the Madras High Court went thoroughly into this question, and held, on the authority of the Dattaka Chandrika and Dattaka Mimansa, that the daughter's son cannot be legally adopted unless it be shown that, in the country of the parties, that law has been modified by custom which has received judicial recognization. The Court also remarked,—" In our judgment no custom, how " long so ever continued, which has never been judicially recog- " nized, can be permitted to prevail against distinct authority."

It has been recently held by the Bombay High Court, that " it " is a general rule and fundamental principle amongst Brahmins, " Kshatriyas, and Vaishyas, that they are absolutely prohibited " from adopting a daughter's or sister's son, or son of any other " woman by reason of propinquity; the burden of proving " special custom to the contrary amongst any member of these " three regenerate classes, prevalent either in their caste or in a " particular locality, lies upon him who avers the existence of " that custom."—*Gopal Narhar Safray* v. *Hanamont Gunesh Safray* (Ind. Law Rep., Bom. Series, Vol. III, p. 273).* But a *sudra* is competent to adopt a sister's son (Dattaka Mimansa, Sec. II, pl. 74 & 91; Dattaka Chandrika, Sec. I, v. 17).

In the case of *Gopalayan* v. *Raghu Patiyan* (Mad. H. C. Rep., Vol. VII, p. 250), the question was, whether a Brahmin could legally adopt his sister's son. In this case an issue was raised by the High Court to this effect, whether the conduct of the plaintiff, and that of the members of his family, been such

* The following authorities are referred to in this case: — Strange's Hindu Law, Vol. II, pp. 100, 101; Moore's Ind. App., Vol. IX, p. 506; S. C., Cal. W. R., Vol. I, P. C., p. 25; Morley's Dig. (1850), Vol. III, Tit. Adoption, p. 58; S. C., Macnaghten's Considerations of Hindu Law, p. 167; Morley's Dig. (1850), Vol. IV, Tit. Adoption, p. 61; S. C., S. D. A. Rep., Vol. VI, p. 192. See Bom. H. C. Rep., Vol. IV, S. C. D., 130; Bor. Rep., Vol. II, p. 83; Strange's Hindu Law, p. 83; Suth. Synop., Hd. II; Stokes's Hindu Law, p. 664; Mad. H. C. R., Vol. I, 420.

as to render it inequitable for him to set up, as against the present defendant, the rule of law upon which he now insists. The Civil Judge, to whom the case seems to have been remanded to make an enquiry and give his opinion in this issue, found, that there had been a long course of acquiescence by all the members of the family, the plaintiff included, in the validity of the sonship asserted. The High Court, thereupon, held, that although the adoption was invalid and inadequate of itself to create a communion, that communion had been created by the course of conduct of the plaintiff and his family, coupled with the defendant's change.

In the case of *Sadashiv Moreshvar Ghate* v. *Hari Moreshvar Ghate* (Bom. H. C. Rep., Vol. XI, p. 190), where the defendant actively participated in the adoption of the plaintiff by the defendant's brother, and by many acts signified to the plaintiff and to his adopting father the defendant's complete acquiescence in the adoption, and thereby encouraged the plaintiff, who was an adult, to assent to such adoption, and allowed the adopting father to die in the belief that the adoption was valid, and finally concurred in the performance by the plaintiff of the funeral ceremonies of his adopting father,—the Bombay High Court held, that the defendant was estopped from disputing the validity of the adoption. In this case the defendant, among other objections, pleaded that the *upanayan* and marriage ceremony of the plaintiff, having taken place in the family of his natural father before the alleged adoption, the adoption was invalid, but the Court expressed no opinion on this point. See also S. A. 50 of 1873, *Chintu* v. *Dhandu*, 6th August, 1873; *Anandrav Sivajee* v. *Gonesh Eshvant Bokil* (Bom. H. C. Rep., Vol. VII, Appx. xxxiii); *Gooroo Prasanna Singh* v. *Nil Madhab Singh* (W. R., Vol. XXI, 84).

In the Dattaka Mimansa, the period fixed beyond which adoption cannot take place, is the age of five years, and, if the ceremony of tonsure has been performed within that period in the family of the natural father, the son so adopted cannot become a *dattaka* in the ordinary form, but must be considered an *anitya dwyamushyayana*. Jagannatha, on the authority of the Kallika Purana, also maintained that a boy exceeding the age

of five years could not be adopted in the *dattaka* form. A boy, therefore, being received under the age of five years, is in law the true son of the adopter (Colebrooke's Dig., Vol. II, Bk. V, Chap. IV, Sec. VIII, p. 393, and see also the passage of the Kalliaka Purana, p. 329, which forbids the adoption of a boy exceeding the age of five years).

Pandit Isvar Chandra Bidyáságar has also stated in his book on widow marriage that, before the receiving of the Dattaka Chandrika as an authority in Bengal, it was necessary for all the Hindoos to adopt a son under the age of five years, and to perform the tonsure ceremony in the adoptive father's family; and I think every Hindoo can bear witness to the fact that until this dictum was disturbed by our English Courts, all of them thought it to be the law, and even now every Hindoo wishing to adopt would prefer to adopt a boy under five years. See "The Hindoo Widow Marriage," Bengali edition, pp. 185 & 186.

In the case of *Kirt Narayan*, appellant (Sel. Rep., Vol. I, new edn., p. 213), it was held that the adoption of a boy exceeding the age of five years, the boy adopted, not having been previously initiated in the family of his natural father, is legal. The point was referred to the Zilla Court Pandit, who gave an opinion that "a boy who is under five years of age, and whose head has not been shaved with the usual formalities in his own father's family, is the fittest for selection; but that if he be above the age of five years, and the proper ceremony of tonsure be performed in the family of the adopter, the selection is, indeed, improper, but that the adoption is valid." It seems, according to this ruling even, the ceremony of tonsure was considered necessary to be performed in the family of the adopter; but I think now tonsure is not considered as a bar to adoption, the three superior tribes are adopted before the age of *upanayan*, and *sudras* before marriage. It was ruled by the late Supreme Court of Bengal, *that* the fact of tonsure having been performed in the natural family creates no bar to a valid adoption—*Srimati Jaymani Dasi* v. *Srimati Shiba Sundari Dasi* (Fulton, Vol. I, 75). So also in *Ram Kishore Acharji Chowdry* v. *Bhuvan Mayi Debya Chowdhurany* (7th March, 1859, S. D. R., 229), it was held, that although the plaintiff was near twelve years of age at the time of his adoption,

and the ceremony of tonsure had been performed in his natural family, yet, as he had not been invested with the sacred thread previous to his adoption, the adoption was valid. In this case, however, the boy was the nephew of his adoptive father, and the Court proceeded, on the authority of the case of the Rajah of Tanjore (Morley's Dig., Vol. I, pp. 22, 87), in which it was laid down that "an adoption is good, though the adopted should have passed his fifth year at the time of adoption, and have undergone the ceremony of tonsure, provided he be a *sagotra*,—that is, descended in a direct male line from a common male ancestor." Sutherland is also of opinion that the adoption of a boy exceeding the age of five years is not invalid. The authenticity of the passage in the Kallika Purana is disputed by some and disregarded by others, as inconsistent with the general spirit of the law of adoption, and is considered as binding only on the conscience of the pious Hindoos and not sufficient to invalidate the adoption.

It is quite certain, however, that a boy invested with the sacred thread becomes absolutely incapable for adoption, and this ceremony may be postponed in the case of a Brahmin to 16 years after the date of conception, 22 years after the same date in the case of a Kshatriya, and 24 years in that of a Vaishya (Macnaghten's Hindu Law, p. 76 ; Sutherland's Synopsis, Head II, p. 217)—*Ranee Sibagamy Nachiar* v. *Strimathu Heraniah Gurbah,* in which the Madras Sudder Adalut held, that a child could be adopted from the twelfth day after his birth to the day of *upanayan ;* see also the case reported in Mad. H. C. Rep., Vol. III, p. 28, where it was held, that the weight of authority is against the validity of the adoption of one upon whom the *upanayana* has been already performed.

In the case of *sudras,* adoption can take place at any time before marriage—*Srimati Jaymani Dasi* v. *Siba Sundari Dasi* (Fulton, Vol. I, 15) ; *Ranee Nitra Dayee* v. *Bhola Nath* (S. D. Rep. for 1853, p. 533) ; *Chitticolum Prasanna Venkatachila Reddiar* v. *Cheli Colum Muda Venkatachilla* (case No. 7 of 1823, 1st Dec., M. S. A., 406). See also Strange's Hindu Law, p. 91 ; Vyavastha Darpana, pp. 856, 862 ; and Macnaghten's Principles of Hindu Law, p. 75. This rule of Hindoo law, which required a *sudra* to remain unmarried in order to be fit for adoption by another,

has been relaxed in Western India in the case of *sagotra* adoption.

"According to the Hindoo law obtaining in Western India, the adoption of a *sudra*, who is married at the time of his adoption, is not invalid if the adopted person be a *sagotra* (of the same family) of the person adopting. *Vide Nathaji Krishnaji* v. *Hari Jogaji* (Bom. H. C. Rep., Vol. VIII, p. 67, A. C. J.)

In the case of *Raji Vyan Katrab Anandrav Nimbalkar* v. *Jaye Ventrav bin Malhanrab Ranadive* (Bom. H. C. Rep., Vol. IV, p. 191, A. C. J.), it was held, that the adoption by a Hindoo widow of an only son of an advanced age, if valid in every other respect, could not be declared invalid on the ground of age. "If the adopted be not a proper person, the sin lies on the giver and the receiver alone; but the adoption must stand." In this case the adopted son was already married at the time of adoption.

We find in Macnaghten's Hindu Law that the party to be adopted should neither be the only nor the eldest son, nor an elder relation such as the paternal or maternal uncle; that he should be of the same tribe as the adopting party. This is no doubt consistent with the Hindoo law. (Dattaka Chandrika, Sec. 1, placita 27, 29; Dattaka Mimansa, Sec. 2, placita 38.) So an only son must not be given nor accepted, for Vasishtha ordains: "Let no man give or accept an only son; nor, though a numerous progeny exists, should an eldest son be given, for he chiefly fulfils the office of a son" (Mitacshara, Chap. I, Sec. XI, p. 73). An only son cannot become absolutely an adopted son, but he may be affiliated as a *dwyamushyayana*, or son of two fathers, for fear of extinction of lineage to the natural father does not exist; *vide* Sutherland's Synopsis, Head II, and the authority there cited— "By no man having an only son is the gift of a son to be ever made" (Sanouca cited in pl. 29, Dattaka Chandrika, Sec. 1); "by a man having several sons, such gift is to be anxiously made," the same person cannot be adopted by more than one individual except in the case of one nephew by several uncles, whole brothers of his natural father; Sutherland's Synopsis, Head II. In spite of the express prohibition as to the adoption of an only son, there seems to be a great difference of opinion between the different

High Courts. We have seen the Bombay High Court has held the adoption of an only son to be valid.

The Punjab Chief Court has also upheld the adoption of an only son—*Makhan Lal* v. *Musst. Sukheya* (Punjab Record, Vol. V, p. 56). In this case there was difference of opinion as to the validity of adoption according to the Hindoo law, but the adoption was declared valid, because the general custom of the country sanctioned such adoption.

There are several cases decided by the Madras High Court upholding the adoption of an only son—*Chinna Gaundan and others* v. *Kumara Gaundan* (Mad. H. C. Rep., Vol. I, p. 54), and *V. Singama* v. *Binja Muri Benkatu Charli* (Mad. H. C. Rep., Vol. IV, p. 165).

In the case of *Chinna Gaundan* (Mad. H. C. Rep., Vol. I, p. 54), Scotland, C. J., discussed the question as follows:—"This is a "short point on which we may clearly come to a conclusion. Two "questions are raised—First, did this adoption in point of fact "take place? Secondly, if so, was it valid in point of law? "It is admitted that the first question must be answered in the "affirmative. Then as to the second, the only authority pro- "duced is a passage from Mr. Justice Strange's Manual of Hindu "Law. Everything found in that book is undoubtedly deserving "of much respect; but it must be observed that the passage in "question is not supported by any cited authority, and on "perusing it attentively, it is, I think, clear, that the learned "author must have been dealing with religious considerations "strictly, and that when he says that the adoption of an only "son is 'void,' he means void from the orthodox theological "point of view of the *shastras* and commentaries, and as "being likely in Hindu belief to entail painful consequences in "'*Put*.'

"But we are here to decide on temporal rights, not to con- "sider such spiritual liabilities; and the application of the "maxim *factum valet* to such a point as the present, is wise I "think, and justified by many authorities, which quite preclude "our giving effect to the conclusion stated in Mr. Justice "Strange's Manual.

"'The result of all the authorities,' says Sir Thomas Strange

"(Hindu Law, p. 185), 'is, that the selection is finally a matter of "'conscience and discretion with the adopter, not of absolute "'prescription, rendering invalid an adoption of one, not being "'precisely him, who on spiritual considerations ought to have "'been preferred.' And again, with regard to both these prohibi-"tions respecting an eldest and an only son, where they most "strictly apply, they are directory only; and an adoption of "either, however blameable in the giver, would, nevertheless, to "every legal purpose, be good according to the maxim of the "Civil law, prevailing, perhaps, in no code more than in that "of the Hindoos, *factum valet quod fieri non debuit* (Hindu "Law, p. 187). Then, there is the case of *Veeraper Mall Pillay* v. "*Narrain Pillay*, with those of the *Rajah of Tanjore*, *Aruna* "*Chalum Pillay* v. *Ayyasami Pillay*; *Nundram* v. *Kashee* "*Pandi* (S. D. A., Vol. III, p. 70; Sel. Rep., Vol. III, p. 310);* "*Srimuttee Jaymanee Dasi* v. *Sibasundari Dasi*, all of which "are noted in the first volume of Morley's Dig., p. 17, and all of "which support Sir Thomas Strange's doctrine.

"Referring to Mr. Justice Strange's argument, I may observe "that it rests on the assumption that it is the birth or adoption "of the son that delivers the natural or adoptive father from the "danger of 'Put.' But surely this is erroneous. It is the son's "performance of his father's exequial rites, not his birth or "adoption, that delivers the father from the danger in question. "Would the father, after the birth or adoption of a son, be consi-"dered safe from 'Put,' if those rites were not performed, owing "to the son's death, his loss of caste, or for any other reasons. "If the mere birth of a son were all that was required, it would "hardly be laid down, as it is (Dattaka Chandrika, 1, 5), that on "the death of such son the affiliation of another is indispensable. "Adoption takes place according to Atri (Dattaka Chandrika, "1, 3) 'for the sake of the funeral cake, water, and solemn "rites,' and according to Menu (*ibid* and Dattaka Mimansa, 1, 9) "for these objects and also for the celebrity of the adoptive

* *Note.*—I do not really understand how the principle laid down in *Nunda Ram's* case (Sel Rep., Vol. III, p. 310) can support the proposition that the adoption of an only son is not invalid.

"father's name. But not for the sake of the supposed efficacy "of the mere act of adoption. If, then, the saving virtue lies "solely in the performance of the exequial rites, Mr. Justice "Strange's doctrine of the total expenditure on the natural "father of the efficacy of his son's birth, does not seem to "warrant his conclusion. The adopted son may well perform "his adoptive father's rites, and in certain cases it appears, when "he is a *dwyamushyayana*, those of his natural father also. "It cannot then be said that the adoption 'fails in its essen-"tial use,' and is for this case void. I may remark that the "hostility shown in the *shastras* to the adoption of an only son "arose probably from other than mere religious considerations. "The true reason, perhaps, is furnished by Jagannatha, who lays "down the law thus:—'Let no man accept an only son, because "'he should not do that whereby the family of the natural father "'becomes extinct,' but this, he goes on to say, 'does not in-"'validate the adoption of such a son actually given to him.'"

"On the whole the case is concluded by authority; but I "must say, with all possible respect for Mr. Justice Strange, that "upon principle and reason I should have felt myself bound to "decide the point in the same way" (Mad. H. C. Rep., Vol. I, pp. 54 to 58). On the Bengal side we also find some decisions upholding the adoption of an only son.

In the case of *Srimati Joymoni Dasi* v. *Srimati Siba Sundari Dasi* (Fulton, Vol. I, p. 75), Sir Edward Ryan, the Chief Justice of the Calcutta Supreme Court, remarked as follows:—"On the "first point, the adoption of an only son is no doubt blameable by "Hindoo law, but when done it is valid." Again in *Musst. Tikdey* v. *Lala Hari Lal* (15th March, 1864), decided by the Bengal High Court, Raikes, J., observes:—"That though it is allow-"ed that the father should not give up his eldest or his only son "for adoption by another, we are not shown any reliable authority "on the illegality of such selection when once made and acted "upon."

I have not seen the whole of this case. Mr. Rattigan refers it to page 133 of the Special Number of the Weekly Reporter, where I did not find it (*vide* Rattigan, pp. 46 and 47). If the Calcutta High Court had taken the trouble of seeing the Dattaka Chandrika

and Dattaka Mimansa, and the case reported in Vol. III Sel. Rep., p. 310—*Nanda Ram* v. *Kashee Pandy*—it could have seen that the adoption of an only son is absolutely void according to Hindoo law. See also *Debi Dayal* v. *Har Har Singh* (Sel. Rep., Vol. IV, p. 407). In the former it was held, on the authority of the Dattaka Chandrika, Dattaka Mimansa, and Vasishtha, there cited, that, according to the law as current in Behar, an only son could not be given or received in the *dattaka* form of adoption (Sel. Rep., Vol. III, new edition, p. 310). The case in Vol. IV Sel. Rep., p. 407, also supports the above principle. Some of the *vyavasthas* in this case show that a woman in time of distress can give her only son in adoption in the *dwyamushyayana* form.

Sir Thomas Strange is of opinion that "the prohibitions respecting the adoption of an eldest or only son; where they most strictly apply, are directory only; and adoption of either, however blameable in the giver, would, nevertheless, to every legal purpose be good." (Vol. I, p. 81.)

Macnaghten, after prohibiting the adoption of an only son as already stated (pp. 73, 74), subjoins a foot-note (*vide* Macnaghten's Hindu Law, p. 74, foot-note), to the effect, "that this is an "injunction rather against the giving than the receiving of an "only or elder son in adoption, and the transfer having been once "made it cannot be annulled."

In the case of *Rajah Upendra Lal* v. *Srimati Rani Prasanna Mayi* (Ben. Law Rep., Vol. I, p. 221, S. C. J.), late Justice Dwarka Nath Mitter held, that the adoption of an only son is clearly illegal according to Hindoo law; he entirely dissented from the Madras case, and remarked :—"It appears "that the plaintiff was the only son of his natural father, "and the adoption of an only son is contrary to the Hindu law. "The title set up by the plaintiff must necessarily fail, that the "adoption of an only son is prohibited by Hindu shastras, is "beyond all controversy. The leading authorities on the subject "are unanimous in declaring that such an adoption should never "be made."

The learned Judge then cites the verses from the works of authority, and then proceeds—"The passages cited above are

" sufficient to show that the adoption of an only son is forbidden " by the Hindu law. It has been said that the prohibition con- " tained in these passages amounts to nothing more than a mere " religious injunction, and that the violation of such an injunc- " tion cannot invalidate the adoption after it has once taken " place. We are of opinion that this construction is not sound. It " is to be remembered that the institution of adoption as it " exists among the Hindus is essentially a religious institu- " tion. It originated chiefly, if not wholly, from motives of reli- " gion, and an act of adoption is to all intents and purposes a " religious act, but one of such a nature that its religious and " temporal aspects are wholly inseparable. 'By a man destitute of " 'a male issue only,' says Menu, 'must the substitute for a son of " 'some description always be anxiously adopted for the sake of " 'the funeral cake, water, and solemn rites?' It is clear, therefore, " that the subject of adoption is inseparable from the Hindu " religion *itself*, and all distinction between religious and legal " injunctions must be necessarily inapplicable to it. Suppose for " instance that a son has been adopted by a childless widow without " the permission of her husband; the prohibition against such an " adoption is contained in the following passage:—'Let not a " 'woman either give or receive a son in adoption unless with the " 'assent of her husband.' Can it be said that such an adoption " would be valid in law? It will be observed that the language " employed in the preceding text is precisely similar to that em- " ployed in the text prohibiting the adoption of an only son, and " it would be difficult to suggest a reason why an adoption " invalidated in the one case for temporal purposes, upon con- " siderations arising out of the religious view of the matter, " should not be equally invalidated in the other case upon simi- " lar ground; one of the essential requisites of a valid adoption " is, that the gift should be made by a competent person, and " the Hindu law distinctly says, that the father of an only son " has no such absolute dominion over that son as to make him " the subject of a sale or gift (see text of Vishnu quoted in " v. 5, Sec. IV of the Dattaka Mimansa). Such a gift, therefore, " would be as much invalid as a gift made by the mother of the " child without the consent of the father. It is to be borne in

"mind that the prohibition in question is applicable to the giver "as well as to the receiver, and both parties are threatened with "the offence of 'extinction of lineage' in case of violation. "Now, the perpetuation of lineage is the chief object of adoption "under the Hindu law; and if the adoptive father incurs the "offence of 'extinction of lineage' by adopting a child who is "the only son of his father, the object of the adoption necessa- "rily fails. It is true that the doctrine of *factum valet* is to a "certain extent recognized by the lawyers of the Bengal school, "but if we were to extend the application of this doctrine to the "law of adoption, every adoption, when it has once taken place, "will be, as a matter of course, good and valid, however grossly "the injunctions of the Hindu *shastras* might have been violated "by the parties concerned in it. The case of *Chinna Gaundan* "v. *Kumara Gaundan* (reported in Vol. I Stoke's Rep., p. 54) "is no doubt in favor of the appellant; but, for the reasons stated "above, we are unable to concur with the learned Judges who "decided that case. On the other hand, we find two cases in our "own presidency, which are directly in favor of the view we "have taken, and what is of still greater importance, both of "these have been cited with approbation by Sir W. Macnaghten "himself. The first case is reported in p. 178, Vol. II of his work "on the Hindu law, and the second is to be found in p. 179 of "the same volume. We may also observe that the learned "translator of the Dattaka Chandrika and the Dattaka Mimansa "is of the same opinion."

In the case of *Gakulananda Das* v. *Mussamat Amadayy*, it was also held, that an only son cannot be adopted except by his father's brother, in which case he becomes *dwyamushyayana* (W. R., Vol. XXIII, p. 340; see also W. R., Vol. X, p. 347). The former ruling is no doubt consistent with the principle laid down by Sutherland in his Synopsis, Head II, where he distinctly holds that an only son cannot become an absolute adopted son, but he may be affiliated as *dwyamushyayana*, see p. 180, and the authority there cited. Mr. Rattigan, in his work on adoption, impeaches the correctness of Justice Mitter's judgment, and holds that the prohibition with regard to the adoption of an only son is simply binding upon the conscience of the pious Hindoos. But, as far as

Bengal is concerned, the question seems to be authoritatively settled by a recent learned decision of the Calcutta High Court.

Justice Markby, after reviewing all the authorities on the subject, distinctly held that the adoption of an only son is invalid according to the Bengal school of the Hindoo law, and the prohibition applies as well to *sudras* as to the higher castes—*Manik Chandra Dutt* v. *Bhagavati Dasi* (Ind. Law Rep., Vol. III, Cal. Series, pp. 443 to 463). In this case an attempt was made to show that the prohibition does not apply to the case of the *sudras*, and with regard to this argument the Court remarked,—"No reason was given for excepting *sudras* from "the rule, and the principle upon which the rule is based, *viz.*, "that a man shall not be allowed to extinguish his lineage to "the detriment, not only of himself, but of his ancestors, appa-"rently applies just as strongly to *sudras* as to other Hindus."

The reasons assigned by Justices Markby and Mitter for invalidating the adoption of an only son in Bengal, where the doctrine of *factum valet* is so often resorted to, *à fortiori* apply to other schools of Hindoo law, where the said doctrine was never heard to have been applied by any commentators on Hindoo law.*

As to the adoption of an eldest son, we find in the Mitacshara that an eldest son should not be given, "nor, though a numerous "progeny exists, should an eldest son be given, for he chiefly "fulfils the office of a son as is shown by the following text:— "'By the eldest son as soon as born, a man becomes the father "of male issue.'" Perhaps it is known to every Hindoo that a very superior efficacy is attached to the *pinda* given by an eldest son, and for this reason he was entitled to a larger share of the paternal property: although it is stated in the commentaries on the Hindoo law that this rule does not obtain in the present *Kali Yoog*, but still do we not find very often eldest brothers

* Jagannatha holds, that the adoption of an only son does not invalidate the adoption (see Colebrooke's Dig., Vol. II, pp. 387, 388), but Jagannatha's opinion cannot prevail over that of Dattaka Chandrika and Dattaka Mimansa, I may add, of Vasishtha and the whole Hindoo law, and prevalent custom.

claiming, and sometimes getting, a share a little more than his legal share of the paternal property by the consent of his younger brothers. Go and enquire of the Hindoos from Sylhet to Cashmere, and from the Himalaya to Cape Comorin, whether an eldest son can be given in adoption; they will all in one voice declare that such an adoption is invalid. In the presence of such a strong feeling against such adoption, we find Justice Markby holding that the prohibition with regard to the adoption of an eldest son, where there are several sons, is "admonitary and not mandatory," or, in other words, it was held that the adoption of an eldest son, where there are several sons, was not invalid by Hindoo law—*Janaki Debya* v. *Gopal Acharji* (Ind. Law Rep., Vol. II, Cal. Series, pp. 365 to 374).

Assuming that a person is in other respects competent to adopt, is he subject to any or what restriction in making the selection of a child? The law on this subject is laid down in the Dattaka Mimansa, slokas 28th, 29th, 30th, 31st, and the 67th of the 2nd section, and the 10th, 11th, 12th, 20th, 21st, 22nd, 27th, and 28th slokas of the 1st section of the Dattaka Chandrika. They are as follows:—

"Now amongst near *sapindas,* kinsmen of the same general family, "a brother's son only must be affiliated; and this doctrine is recog- "nized also by Vijyaneshwara"—(Dattaka Mimansa, Sec. II, sloka "28).

"By the position, that a brother's son only must be affiliated, it is "meant that the son of a whole brother only must be affiliated. Menu "declares this,—'If one among brothers of the whole blood (ekajata) "be possessed of male issue (putravan), Menu pronounces that they "all are fathers of the same by means of that son'"—(Dattaka Mimansa, Sec. II, sloka 29; see also Menu, 182, Chap. IX).

In this text, the state of brothers as adoptive fathers being propounded, their incapacity to the objects of adoption follows—(Dattaka Mimansa, Sec. II, sloka 30).

"'Of the whole blood.' By this expression, it appears that this condi- "tion of adoptive fathers, alluded to, applies to those only begotten "by the same father or the same mother, not to such as are "born of a different father or mother"—(Dattaka Mimansa, Sec. II, sloka 31).

"Hence it is settled point that amongst near *sapindas* or other

"kinsmen of the same general family, a brother's son only must be "affiliated; and therefore by being adopted the brother's sons and "other kinsmen are first in participating in the estate and funeral "oblation; but not being adopted, they hold their respective places "(in the order of heirs)"—(Dattaka Mimansa, Sec. II, sloka 67).

"The rules relative to the adopted son are now propounded. On this "subject, Sanouca ordains,—'The adoption of a son by any Brahmana "must be made from amongst *sapindas* or kinsmen connected by "oblation of food; or on failure of these, an "*asapindas*," or one not "so connected; otherwise let him not adopt'"—(Dattaka Chandrika, Sec. I, sloka 10, p. 131).

"Here, since it is mentioned generally from amongst *sapindas*, it "is meant from such, both of the same or different general family; "and accordingly on default of a '*sapinda*' kinsman, one belonging "to the same general family, and failing this latter, a person even of "a different general family are to be adopted. Sakala declares thus,— "'Let one of a regenerate tribe destitute of male issue, on that account "adopt as a son the offspring of a "*sapinda*" relation particularly, or "also next to him, one born in the same general family. If such exist "not, let him adopt one born in another family, except a daughter's son "and a sister's son and the son of the mother's sister'"—(Dattaka Chandrika, Sec. I, sloka 11, p. 132).

"Otherwise, 'Let him not adopt.' By this, a given son being other "than a Brahmana, a Khatriya, and so forth, in short of a different "class, is excluded. Thus Menu declares, 'he is called a son given, "'whom his father or mother affectionately gives as a son being alike "'and in a time of distress, confirming the gift with water'"—(Dattaka Chandrika, Sec. I, sloka 12, p. 132).

"In respect, however, to this subject (it is to be observed that) "where a brother's son may exist amongst near kinsmen, he only is "to be adopted. Thus Menu ordains:—'If one among brothers of "'the whole blood be possessed of male issue,' Menu pronounces "'that they all are fathers of the same by means of that son.' Vri-"hashpati (also):—'If there are several brothers, the sons of one "'man by the same mother, or a son being born to one even of them, "'all of them are declared to be fathers of male issue.' Under these "two texts, if a brother's son is in any manner capable of being a "substitute, it is inferred that another is not to be adopted"—(Dattaka Chandrika, Sec. I, sloka 20).

"'Offspring must be produced.' This precept is peremptory. In

"some manner or another it must be complied with.* Since the "representation of the filial relation here (contemplated) obtains in "the brother's son, the effects thereof, *viz.*, the oblation of water and "the like, and exemption from exclusion from heaven, would be accom-"plished (by his existence); hence there can be no occasion to "proceed in the retainment of the same; consequently a brother's son, "though unadopted, is filially related in conformity with the texts of "*Vrihat Parasara*,—'Let the nephew of a paternal uncle, destitute of "'male issue, be his son; he only should perform his obsequies of "'the funeral repast, and of oblations of food and of water;' hence "a brother's son existing, no affiliation (of him or another) as given, "and so forth, takes place"—(Dattaka Chandrika, Sec. I, sloka 21, pp. 134 to 135).

"This is not to be argued, for although by reason of the nephew's "possessing the representation of the filial relation, he may be the "means of procuring exemption from exclusion from heaven, and so "forth; still as the celebration of name, and the due perpetuation "of lineage, would not be attained, for the sake of the same, the "constituting him (an adopted son) is indispensable. Besides, the two "texts in question do not prohibit, where a brother's son may exist, "the constituting him or another a son given, and so forth: but "indicate (as inherent in a nephew) the virtue of a son consisting in the "capacity to perform the funeral repast, and so forth, for otherwise a "contradiction of the rule for the production of a Kshetraja son not-"withstanding a brother's son may exist, would follow; and since, by "the text subjoined, the resemblance of a son's son obtains in a "daughter's son according to the reasoning recited, the non-adoption "of a son given, and the rest, where a daughter's son also might "exist, would result. By that male child whom a daughter, whether "formally appointed or not, shall produce from a husband of an equal "class, the maternal grandfather becomes the grandson of a son's "son: let that son give the funeral oblation and possess the inherit-"ance"—(Menu, 9, s. 136; Dattaka Chandrika, Sec. I, sloka 22, p. 135).

"But if a brother's son existing, the affiliation of him only is indis-"pensable; where there may be only one brother's son, in that case "the adoption cannot take place, on account of the text of *Vasishtha*,

* This passage is assumed to be a quotation. It is almost identical with a portion of a passage from Medhatithi cited in Sec. I, sloka 60, Dattaka Mimansa.

"which recites—'An only son let no man give or accept, for he is "'destined to prolong the line of his ancestor'"—(Dattaka Chandrika, Sec. I, sloka 27, p. 138).

"Should this be alleged, it is not accurate, for the text in question "is applicable to a case other than that of the *dwyamushyayana* or son "of two fathers. In the case of the *dwyamushyayana*, the extinction "of lineage contemplated in the clause of the text containing the "reason would not take place; and an indication is found in the "Puranas as to the affiliation by *Vetala* of the son of (his brother) "*Bhairaba*. Thus, accordingly he (*Bhairaba*) at some time copulated "with *Urvarsi*, a celestial nymph, and procreated on her a son named "*Suvesa*. *Vetala* also affiliated him as his son, and in consequence by "means of this son both attained heavenly salvation"—(Dattaka Chandrika, Sec. I, sloka 28, p. 138).

Macnaghten, in his work on the Hindoo Law, after stating the principle laid down in the case of *Ooman Datta* v. *Kanai Singh* (Sel. Rep., Vol. III, p. 192, new edition), to the effect that, while a brother's son exists the adoption of any other is illegal, remarked, that "this is undoubtedly consonant to the doctrine contained in "the Dattaka Mimansa, but it is controverted in the Dattaka "Chandrika. It would appear, however, that, according to the law "of Bengal and elsewhere, where the doctrine of the latter autho- "rity is chiefly followed, and where the doctrine of *factum valet* "exists, a brother's son may be superseded in favor of a stranger." I have gone through the Dattaka Chandrika, and I do not find any passage in that book which would go to support the dictum laid down by Macnaghten. I do not know from what authority Macnaghten attributes this opinion to the author of the Dattaka Chandrika. The slokas already quoted would clearly go to prove that, "if a brother's son capable of being adopted exists, he must be selected in preference to other kinsman." Hindoo writers are so jealous about the intrusion of a stranger in the family, that they would allow a brother having an only son even to give him in adoption to another brother in the *dwyamushyayana* form, and it is necessary for a brother destitute of a son to adopt the only son of a whole brother in that form if no other nephew exists for selection—Sutherland's Synopsis, Head II, para. 2; Dattaka Chandrika, Sec. I, vv. 27 and 28. I think

nobody would deny the soundness of the rule which tries its best to keep the property in the same family in spite of the malice and jealousy that very often exist among wealthy Hindoos. The principle of the law which would not allow a weak minded man to be unduly influenced by adventurers to enter into an improvident contract injurious to him, would in the same wav prevent a malacious and jealous man to adopt a stranger when a brother's son may be procurable for adoption. Now, as to the opinion attributed to the Dattaka Chandrika, Macnaghten, I think, was misled by sloka 22, Sec. 1 of that book, wherein it is stated :—" Besides the two texts in question do not " prohibit, where a brother's son may exist, the constituting " (*him or another*) a son given, and so forth, but indicate (as " inherent in a nephew) the virtue of a son consisting in the " capacity to perform the funeral repast, and so forth." Perhaps the passage " the two texts do not prohibit, where a brother's " son exists, the constituting *him or another a son given*," *&c.*, has induced Macnaghten to come to the conclusion that a brother's son may be superseded in favor of a stranger; but if we read slokas 20, 21, 22, and 23, it will become clear that in Sec. 22 the author's object was to show that where a brother's son exists, a man may adopt a son, for an objection was raised in Secs. 21 and 22, that where a brother's son exists, there is no necessity for adoption, because all the brothers are declared to be fathers of that son (Dattaka Chandrika, Sec. I, sloka 20). And then the author, after showing the necessity for adoption, proceeds thus :—" This is not to be argued, for although by reason of " the nephew's possessing the representation of the filial relation " he may be the means of procuring exemption from exclusion " from heaven, and so forth, still as the celebration of name and " the due perpetuation of lineage would not be attained, for the " sake of the same the *constituting him* (an adopted son *is in-* " *dispensable.*)" Then the author proceeds thus :—" Besides the " two texts in question do not prohibit, where a brother's son " may exist, the constituting (him or another) a son given." This passage must be construed subject to sloka 20, where it is distinctly stated that where a brother's son is, in any manner, capable of being a substitute, another is not to be adopted. By

the term *in any manner capable of being substituted,* the author, perhaps, means that a stranger is not to be adopted even if a brother's son is only obtainable in the *dwyamushyayana* form of adoption. Then the words "constituting him or another" in Sec. 22, simply mean that a brother's son, if procurable, must be adopted as ordained in sloka 20, and in the absence of a brother's son, another may be adopted. Verse 23 of Sec. 1 will clearly go to show that the author of the Chandrika had not the remotest idea, by the language used in Sec. 22, to express an opinion that a brother's son may be superseded in favor of a stranger, there he did his utmost to get out of the objection that in the presence of a brother's son a man loses the right of adoption altogether; and in Secs. 23, 24, and 26, the author answers the objection raised, that if a man in spite of the text of Menu as stated in sloka 20, having brother's son living, is allowed to adopt, why a sonless rival wife is not allowed to adopt when there is a son belonging to another wife, for the same rule is ordained by Menu in respect to many wives of the same person (*vide* Sec. I, sloka 23, Dattaka Chandrika). The whole genius of the slokas would go to show, that the author, by using the words "constituting him or another," in Sec. 22 does not mean to imply that the nephew has not a preferable right to be adopted, supposing his affiliation not barred by any legal impediment. This is also the opinion of Mr. Sutherland; see the foot-note in p. 135 of Sutherland's Dattaka Mimansa and Dattaka Chandrika. The Privy Council, in the case of *Srimati Uma Deyi* v. *Gakulananda Das Mahapatra* (Ind. App., Vol. V, p. 40), though holding that the prohibition as to the adoption of a stranger when a brother's son exists is only binding upon the conscience of the pious Hindoos and would not invalidate the adoption of a stranger, yet had the fairness to admit that the 20th, 29th, 30th, and the 31st and 67th slokas of the Dattaka Mimansa, Sec. II, and the 20th, 21st, 22nd, 27th, and the 28th slokas of the 1st section of the Dattaka Chandrika, "do in terms prescribe that a "Hindoo wishing to adopt a son shall adopt the son of his "whole brothers, if such a person be in existence and capable of "adoption, in preference to any other person, and qualify the "otherwise fatal objection to the adoption of an only son of the

"natural father, by saying that in the case of a brother's son, "he should nevertheless be adopted in preference to any other "person as *dwyamushyayana* or son of two fathers."

In the case of *Gakulananda Das* v. *Uma Deyi*, the Calcutta High Court also admitted that the old Hindoo writers do not allow a brother to adopt a stranger when a brother's son exists (W. R., Vol. XXIII, pp. 340, 341).

So it will be seen that Macnaghten had no authority whatever to attribute the opinion to the author of the Dattaka Chandrika as he did. The Privy Council and the Calcutta High Court, in the cases referred to above, in substance held, that whatever may be the opinion of Hindoo writers and sages, they would not decide any question against the opinion of Macnaghten, however erroneous it may be. It is really amusing to see how these great men shift their opinion and base it on authorities, and interpret Hindoo laws according to the circumstances of each case. Their Lordships of the Privy Council, in the case of *Srimati Uma Deyi* (Ind App., Vol. V, p. 40), argued the question thus:—
"Before considering this question, their Lordships think it right "to observe that the two propositions just stated, or at least the "last of them, may well be qualified by the incontestable fact "that Haladhar was separate in estate from his brother Jagan-"nath. The whole of the law, supposed to affirm the necessity "of adopting a brother's son, seems to have been deduced by the "ancient commentators, with what logical sequence it is unneces-"sary to consider, from a text of Menu, which says,—'If one "'among brothers of the whole blood be possessed of male issue, "'Menu pronounces that they all are fathers of the same by "'means of that son.' The direct consequence of this might "well be that, in an undivided family (the normal state of a "Hindoo family), the nephew without further act of affiliation "would effectually perform the funeral obsequies of his uncle, "whose share in the joint family property, in the absence of "male issue, would pass to his coparceners by survivorship. But "in the case of a separated Hindoo, the right of performing his "obsequies, with the consequent right of succession, is, in the "absence of male issue, in his widow, or failing her, in his daugh-"ter and daughter's issue.

" Again, to constitute a *dwyamushyayana* there must be a special " agreement between the two fathers to that effect, or the relation " must result from some of the other circumstances indicated by Sir " William Macnaghten at p. 71 of his Principles and Precedents. " And he there states the consequences to be different from those " of an ordinary adoption, inasmuch as the children of the adopted " son would revert to their natural family. Hence the adoptive " father fails by such an adoption to perpetuate his own line of " male succession—a circumstance which renders the consent of " divided brothers to such an adoption the more improbable.

" In the present case there is nothing to show, and it is un- " reasonable to presume, that Haladhar would have been content " to receive, or Jagannatha would have been willing to give, the " only son of the latter in adoption. And the presence of the " name of the latter on some of the documents which describe " the defendant as the adopted son of Haladhar, is some evidence " that Jagannatha recognised that adoption as valid. Moreover, " for aught that appears in the cause, Dinabandhu may, at the " date of the adoption, have become from age, marriage or other " like objection, incapable of being adopted by his uncle.

" Reverting, however, to the general question whether the " omission to adopt a brother's son is an objection which at law " invalidates an adoption otherwise regularly made, and so des- " troys the civil status of the person thus adopted, even after, " as in this instance, years of recognition, their Lordships have " to observe, in the first place, that they have been referred to " no case in which a Court of Justice has so decided. The nearest " authority of the kind is that of *Ooman Datt* v. *Kunhi Singh* " (S. D. A. Sel. Rep., Vol. III, p. 144; Sel. Rep., Vol. III, new " edition, p. 192). That case arose in a district governed by the " Mithila law. The plaintiff claimed, under an adoption by his " maternal grandfather, not in the *dattaka*, but in the *kritrima* " form, which is recognised by the Mithila law to dispossess the " nephew and heir of that grandfather from the share of the " latter in a joint family estate. Various objections, besides the " one in question, were taken to the adoption; the case, after the " fashion of those days, went from one Judge of the Sudder Court " to another, who consulted different Pandits and came to conflict-

"ing decisions, but ultimately the suit was dismissed. The "marginal note no doubt says:—'According to the Hindu law, "'while a brother's son exists, the adoption of any other individual "'as a son either in the *dattaka* or *kritrima* form of adoption is "'illegal.' But the force of this note is very much weakened by "the fact that Sir William Macnaghten, who, being the editor of ' the reports, was probably the author of it, afterwards and with "a full recollection of the case, wrote the passage which will be "presently cited. The decision itself was merely on an alleged "adoption in the *kritrima* form, which in its inception and conse-"quences is very distinguishable from one in which the natural "father parts with the son in the full faith that he will be "effectually and for all purposes received into his new family, "and acquire therein the rights which he absolutely loses in his "own. The son adopted in the *kritrima* form retains his rights "of inheritance in his original and natural family.

"The general question seems to have been considered by Sir "Thomas Strange, Mr. Colebrooke, and other text-writers of "eminence.

"Sir Thomas Strange, after recapitulating the rules which "ought to guide the discretion of the adopter, including the "authorities on which the plaintiff relies, says:—'But the result "'of all the authorities upon this point is, that the selection is "'finally a matter of conscience and discretion with the adopter, "'not of absolute prescription, rendering invalid an adoption of "'one not being precisely him who upon spiritual considera-"'tions ought to have been preferred.' And by his reference "to the cases collected in the second volume, he shows that "Mr. Colebrooke and more strongly Mr. Elis were of this "opinion."

"Again, Sir William Macnaghten, just after referring to the "case of *Ooman Datt*, deals with the question thus:—It would "appear, however, that according to the law of Bengal and else-"where, where the doctrine of Dattaka Chandrika is chiefly fol-"lowed, and where the doctrine of *factum valet* exists, a brother's "son may be superseded in favour of a stranger, and even in "Benares and in the places where the Mimansa principally ob-"tains, and where a prohibitory rule has in most instances the

"effect of law, so as to invalidate an act done in contravention "thereto, the adoption of a brother's son or other near relative is "not essential, and the validity of an adoption actually made does "not rest on the rigid observance of that rule of selection, the "choice of him to be adopted being a matter of discretion. It "may be held, then, that the injunction to adopt one's own "*sapinda* (a brother's son is the first), and failing them to adopt "out of one's own *gotra*, is not essential so as to invalidate "the adoption in the event of a departure from the rules." (Principles and Practice of Hindu Law, p. 68.)

"It may be further observed that even Mr. Sutherland, in his "Synopsis (see Stokes's Codes, p. 656), says—'But though Nanda "'Pandit extends the principle, *i. e.*, that proximity of kindred "'ought to determine the choice of adopted son with elaborate "'minuteness, it cannot be regarded as a rigid maxim of law "'vitiating the adoption of a remote when a near kinsman, or of "'a stranger when a relative, may exist. The right, however, of a "'whole brother's son to be adopted in preference to any other "'person, where no legal impediment may obtain, seems to be "'generally admitted, and may be regarded as a received rule "'of law.' It is not easy to see upon what grounds the dis- "tinction here taken rests. If what the Dattaka Mimansa en- "joins is to be taken as imperative and having the force of law, "the language of the 74th article of the second section, which "deals with the duty of selection where there is no brother's "son, seems to be hardly less imperative than that of the articles "which affirm the preferential right of the brother's son."*

* I admit the rule with regard to the right of a *sapinda* to be adopted in preference to a stranger, is as imperative as the rule relating to the preferential right of a uterine brother's son. Sutherland stated what, according to his information, the Hindoos accepted and regarded as the received rule of law. He does not say that the other part of the law, *viz.*, the preferential right of the *sapindas*, is not consistent with the Hindoo law; he simply said that this part of the rule, according to his opinion, ought not to have any legal force so as to invalidate the adoption of a stranger when there may be a *sapinda* boy procurable for adoption. The fact that one part of the law has been disregarded by the Hindoos cannot be taken as a ground for disturbing that portion of the law which the Hindoos accepted and regarded as received rule of the law.

"It was argued at the bar that the maxim *quod fieri non* "*debuit factum valet*, though adopted by the Bengal school, is "not recognised by other schools, and notably by that of Benares. "That it is not recognised by those schools in the same degree "as in Bengal is undoubtedly true. But that it receives no "application except in Lower Bengal, is a proposition which is "contradicted not only by the passage already cited from Sir "William Macnaghten's work, but by decided cases. The High "Court of Madras, in *Chinna Gaundan* v. *Kumara Ganda* (Mad. "H. C. Rep., Vol. I, p. 54), and the High Court of Bombay, in *Raje* "*Venkatrav Anandrav Nimbalkar* v. *Jaya Vantrav bin M.* "*Ranadoive* (Bom. H. C. Rep., Vol. IV, A. C., 191), acted upon it; "and did so in reference to the adoption of an only son of his "natural father, on which the High Court of Calcutta, in *Rajah* "*Upendar Lal Ray* v. *Ranee Brahma Maye* (Suth. W. R., "Vol. X, 347), has refused to give effect to it, considering that parti- "cular prohibition to be imperative. Their Lordships feel that it "would be highly objectionable on any but the strongest grounds "to subject the natives of India in this matter to a rule more "stringent than that enunciated by such text-writers as Sir Wil- "liam Macnaghten and Sir Thomas Strange; their treatises have "long been treated as of high authority by the Courts of India, "and to overrule the propositions in question might disturb "many titles. Upon a careful review of the authorities, their "Lordships cannot find any which would constrain them to "invalidate the adoption of the defendant, even if it were "more clearly proved than it is that Haladhar Das could have "adopted Dinabandhu, the only son of his brother; they will, "therefore, humbly advise Her Majesty to affirm the judgment "of the High Court and to dismiss the appeal with costs."

The Calcutta High Court, in the case of *Gakulananda Das* (W. R., Vol. XXIII, p. 340), remarked :—" In all cases of an adop- "tion, and specially a case such as this, where the adoption has "been deemed good and apparently acquiesced in for many years "by all the parties, we think that the rule which ought to be "applied is that which is in fact usually followed and is well indi- "cated by Sir Thomas Strange in his work on Hindu Law (Vol. I, "p. 185), where he says :—'The result of all the authorities is, that

"the selection is finally a matter of conscience and discretion "with the adopter, not of absolute prescription, rendering in- "valid an adoption of one not 'being precisely him who on "spiritual considerations ought to have been preferred.' What- "ever may be the strict rule laid down by the texts of the old "Hindu writers, and even supposing it to be what Mr. Suther- "land states it is, there is no doubt that, in practice, Hindus are "not in the habit of restricting their adoption in the manner "now contended for."

Their Lordships of the Privy Council and the Honorable Judges of the Calcutta High Court seem to have based their opinion on these grounds :—

(1.) When writers like Sir Thomas Strange and Macnaghten have held that the prohibition is only binding upon the conscience of the Hindoos and had no legal effect, it would be improper to differ from them.

(2.) The whole of the law supposed to affirm the necessity of adopting a brother's son seems to have been deduced by the ancient commentators with a bad logical sequence from the following text of Menu, which itself does not indicate any such prohibition :—" If one among brothers of the whole blood be pos- "sessed of male issue, Menu pronounces that they all are fathers "of the same by means of that son" (Menu, sloka 182, Chap. IX).

(3.) Whatever may be the law, an adoption ought not to be set aside when it has been acquiesced in for a long time by the members of the family, and that the Hindoos of the present day do not observe the prohibition (W. R., Vol. XXIII, p. 340).

As to the first argument do the slokas of the Dattaka Chandrika and Dattaka Mimansa already quoted, and the texts of our old *Rishis* therein contained, in any way show that the said prohibition is morally binding only? If these passages can be construed into moral prohibition only, then the whole fabric of the Hindoo law may be upset by making the same observation. Ought we to give more weight to Sir Thomas Strange and Macnaghten than to the authors of the Dattaka Chandrika and Dattaka Mimansa? Macnaghten says, that, according to the Dattaka Chandrika, a brother's son may be superseded by a stranger. Does he not thereby base his opinion entirely on the

Dattaka Chandrika? It has been clearly shown and admitted by the Privy Council that the Dattaka Chandrika does not express the opinion imputed to it by Macnaghten. Is it not a mockery of justice yet to hold that because Macnaghten says that, according to the Dattaka Chandrika, a stranger can be adopted to the exclusion of a brother's son, our Courts of Justice ought to abide by the canon laid down by him, though in the original work cited there is nothing to support it?

We are really at a loss to make out where Macnaghten could have stumbled upon such a rare copy of the Dattaka Chandrika, so unique in its opinion and so completely at variance with editions which ordinary mortals have the privilege of reading. I admit Sir Thomas Strange held that the prohibition is merely binding upon the conscience of Hindoos, but do the passages of the Dattaka Chandrika and the Dattaka Mimansa and the texts therein quoted go to support the theory enunciated by him? Do we not find in Sanouca's texts that "the adoption of a son by any Brahmana must be made from amongst *sapindas*, or kinsmen connected by oblation of food, or on failure of these, an *asapinda*, or one not so connected, or otherwise 'let him not adopt?'" Is not the language strong enough to import a legal prohibition? If we enquire into the ethics of the question, do we not find that the prohibition is a safeguard against intrusion of aliens into the family, whose circle has always been considered sacred almost among all the nations of the world? This general license of indiscriminate adoption, given by our Courts of Justice to widows always guided by the pernicious influences of designing men, has become a very mischievous weapon to destroy old families. When, for instance, a boy is picked up from among the lowest class, somehow connected with the *parasites* of the adopter,—can the genuine members of the family be ever expected to entertain the slightest regard for such an upstart who, in his exalted place, only reminds them of his vulgarity? It is by this unrestricted license accorded to widows that many noble families are being degenerated and disintegrated and represented by men whose parents were only fit to be cooks of the family. From experience it will be seen that the discretionary power which has been for the first time given

to adopters by our English Courts is mostly abused by the widows. It seems that the common adage that possession is nine points of the law, nowhere has such forcible application as in adoption cases. In an adoption case, specially when instituted after some time, the Judges consider it a very great hardship to oust the boy from his possession, and being thus influenced more by sentimentalism than law, they apply all their rhetoric in their stock to support their particular theory favorable to the adopted son without caring how far by that they create a revolution in the law they are bound to administer.

All the rulings wherein this prohibition has been construed to be morally binding only, the Judges seem to have allowed their minds to be influenced by the doctrine of acquiescence. Would to God that they had entirely based their opinion on that doctrine. I have every reason to hope that if the question be allowed to be reopened, and if the Judges consider it their duty to decide it according to the Hindoo law as understood by the Hindoos, they will find ample grounds to discover that the moving spirit in those rulings was sentimentalism and a consideration of the hardship which would entail upon the boy in possession. Though, in justification of their conduct, we might add that it is an inseparable element of mischief in judiciary laws that the law is interpreted according to the peculiarities of the case under consideration, yet we must observe that as Judges they ought to be on their guard lest they, in rendering justice to an individual, do injustice to a nation.

As to the second point, I distinctly deny that the whole law on the subject is based on this text of Menu :—" If one among " brothers of the whole blood be possessed of male issue, Menu " pronounces that they all are fathers of the same by means of " that son " (*vide* Menu, Chap. IX, sloka 182; Dattaka Chandrika, Sec. I, sloka 20).

This passage is cited as an auxiliary by the authors of the Dattaka Chandrika and the Dattaka Mimansa to the rule laid down by the Sages Sanouca, Sakala, and Yaska,—" The adoption " of a son by any Brahmana must be made from amongst *sapin-* " *das* or kinsmen connected by an oblation of food, or on failure " of these, an *asapinda* or one not so connected, otherwise let

"him not adopt" (Dattaka Chandrika, Sec. I, slokas 10 to 15; and Dattaka Mimansa, Sec. II, vv. 2, 13, and 14, and the texts therein quoted).

I admit that there may be some objections as to the applicability of this prohibition with regard to *sudras*, but that the three superior tribes are legally bound to adopt the nearest *sapinda* if procurable, is evident from the genius of the whole Hindoo Law. The authors of the Dattaka Chandrika and the Dattaka Mimansa do in clear terms prescribe this limitation, and in all adoption questions their opinion is considered paramount. I do not know why in this case an opinion is imputed to them which they (poor souls!) never dreamt of. Consult the Hindoo pandits, and they will unanimously hold that the prohibition has a legal force.

Now as to the third argument that the Hindoos of the present day do not observe the prohibition, I can only say that whenever a man or widow, having been influenced by malicious motives, adopt a stranger to the exclusion of relatives, the disinterested Hindoos always express their regret, look upon it with disapprobation, and finally shrug their heads and say but for the administration of the Hindoo law by foreigners, we should not have seen men violating Hindoo law with impunity.

In justice to male adopters, we must observe that they rarely adopt a stranger in violation of the Hindoo law, unless a violent feud exists between them and their nearest *sapindas*; even in such cases they have the Hindoo instinct to choose remote *sapindas* if such are procurable; and when near *sapindas* are excluded, it has been seen that the fault lies generally with the giver of the boy than the receiver of him. It is generally when the young widows, surrounded by all kinds of designing men, are the adopters, that they violate the law without feeling the least remorse for tainting the original stock. In such cases the widows and their evil advisers fear that, in case they should adopt a near relative, the boy and the members of the family might exercise a kind of supervision which may not coincide with the inclination of the young adoptive widow; and the servants in their turn fear that they will not be allowed to carry on

their wholesale trade of robbery. This indiscriminate power in the hands of the widows allows them to violate the Hindoo law in more ways than one. In adopting poor men's sons they do not obtain a *sudha* dattak as ordained by *Menu:* the gift in such cases ought to be made on disinterested motives; but such gifts are very rare when they proceed from poor persons quite unconnected with the family (*vide* Menu, Chap. IX, placitum clxviii; see also Dattaka Chandrika, Sec. I, slokas 11, 12, p. 132; W. R., Vol. XXI, 381).

Another rule with regard to the eligibility of the boy for adoption is, that he must be of the same tribe and class. "If the boy be of the same class" (*vide* Menu, Chap. IX, sloka 168).

The author of the Dattaka Mimansa also, on the authority of *Sanouca,* holds, that "should one of a different class be taken "as a son in any instance, let him (the adopter) not make him a "participator of a share (Dattaka Mimansa, Sec. II, v. 21; and "Dattaka Chandrika, Sec. I, v. 15). Hence it is established that "one of a different class cannot be adopted as a son" (Dattaka Mimansa, Sec. II, v. 22). The author of the Dattaka Chandrika after having interpreted the passage "if the boy be of the same class" or "being alike" as the term *sadrisha* (सदृश) of Menu, sloka 168, Chap. IX, has been translated in the Mitacshara to mean "alike not by tribe, but by qualities suitable to the family," holds, that "in fact the construction of the word alike सदृशः in "Menu's text as signifying of the same class, is only proper, "for elsewhere the participation as an heir of such adopted son "is shown: and the participating in the inheritance of one un- "equal in class, is impossible;" *vide* Dattaka Chandrika, vv. 14, 15, 16, Sec I. Now a question arises whether a man can adopt a boy belonging to a family much inferior in class, as far as social position is concerned, to the adopter. The whole genius of the above passages indicates a strong desire that the adopter should select the boy of parents equal to him in social position, and that the boy should be endued with qualities suitable to the family of the adopter. "Being alike," this is interpreted by Medhatithi as signifying alike not by tribe, but by qualities suitable to the family (*vide* Mitacshara, Chap. I, Sec XI, p. 72 and the note; Dattaka Chandrika, Sec. I, placitum xiv).

We are not in a position to give our opinion whether a *kulin* Kyestha holding the position of the Narail Baboos can be considered equal in class to those *kyesthas* who earn their livelihood by serving as khanshamas of Brahmins, or whether a *barendro* Brahmin earning his livelihood by begging from the different sects of Hindoos can be called alike in class (সদৃশং) to the Maharajah of Nattore.

Though prohibited by the sages and digest writers, the gift of a son by one having two sons is seen in practice, and it is not declared invalid by the Courts of Justice (Dattaka Chandrika, Sec. I, placita xxix, xxx).

CHAPTER IV.

CAN A WIDOW IN BENGAL ADOPT WITHOUT PERMISSION?

WHETHER a Hindoo widow in Bengal can adopt a son without any formal permission from her husband?

If I were to answer the question according to the existing opinions of the Bench and the Bar, I should certainly answer it in the negative. But if I minutely enter into the question and consider all the authorities on the subject, I must consider myself bound to say that the question is one which ought to be answered in the affirmative. If the interpretation put upon the Dattaka Chandrika of Devendra Bhattya by the Madras High Court and the Privy Council, in the great *Ramnad* case, be accepted as correct, it will be apparent then to every one that, with regard to adoption, the power of a widow in Bengal is larger than in any other country. It is admitted on all hands that the Dattaka Chandrika of Devendra Bhattya is of paramount authority in Bengal, and if it can be shown that, according to the said author, a widow is competent to adopt after her husband's death without any formal permission, the privilege ought not to be taken away from the widows simply because Mr. Colebrooke, in his note to the Mitacshara, says, that the writers of the Goura school insist on a formal permission from the husband, declared in his lifetime. Such a vague remark, without any authority to support it, at any rate admits of reconsideration. If I can show that Devendra Bhattya has precedence over all other writers, I think it ought to be conceded at least that Colebrooke ought not to be blindly followed. The Madras High Court, in the celebrated *Ramnad* case, Mad. H. C. Rep., Vol. II, p. 206, remarks :—

"Nanda Pandit, an author born in Southern India, is of "course a distinct authority, that the widow can neither give "nor receive a son. He quotes from Vasishtha, one of the original

"legislators, the passage which the subsequent commentators have "professed either to explain or perhaps to explain away, and he "then says:—'If it is intended then that she may adopt a son "'with the assent of the kinsmen even, it is wrong, for the term "'husband would become indefinite: and the purpose would not "'be allowed. Now the purpose of the husband's sanction is, "'that the filiation as son of the husband may be complete even "'by means of an adoption made by the wife.' The reasoning "is, it is an unwarrantable extension of the term husband to "include all his kindred within it. Moreover, such inclusion "would be contrary to the reason of an adoption, which derives "its efficacy from the conjunction of the will of the husband "with the act of the wife. This by a fiction of law renders the "adoption a sort of symbolical begetting, and the son taken is "as the son of him whose will has gone with the act of his wife. "It is true that Nanda Pandit denies also, on the authority of "the same passage, the power of a widow to give a son. It is "important, therefore, to observe that he at all events regarded "the giving and receiving as lying under the same prohibition, "and by his specific rebuttal of the notion that the absence of "the assent of the husband may be supplied by that of kinsmen, "it would seem that such an extension of the doctrine had been "put forward by some during his time, but was repudiated by "his rigorism. We find this to be the case, for his treatise is "supposed to be an expansion of the Dattaka Chandrika."

"We then come to the Smriti Chandrika and the Dattaka "Chandrika, works of Devendra Bhattya. The Smriti Chandrika "is a work next in authority to the Mitacshara, and the Dattaka "Chandrika is the latest work of its author, intended to dispel "any doubts which the former celebrated treatise may have "left. In the Smriti Chandrika:—'The objector says, that "'the gift of a son by his mother is not proper notwithstanding "'her power. The reason of this is her want of independence. "'Refutation—True, but it is right if it be authorised by an "'independent male.' Hence only Vasishtha says:—'No woman "'shall give or receive a son unless with the permission of her "'husband.' In the Dattaka Chandrika the same celebrated "author, in this the latest fruit of his labours, interprets the

" same passage of Vasishtha to mean that a son may not be given " by a woman without the husband's sanction if he be alive, but " that he may be, if he be dead, have emigrated, or entered a " religious order. Then, treating as to the persons who may " adopt, he (clauses iv and vii, Sec. I) comments upon the " passage of Menu, 'that a son of any description must be anxiously " 'adopted by a man destitute of male issue;' and explains that " 'it must not be argued that from the qualities of being male " 'and singular being attributed to the adopting party, by the " 'expression " a man destitute of male issue," something definite " 'is meant; therefore the same person must not be adopted by " 'two individuals, nor any son by women, for the adoption of " 'the *dwyamushyayana*, or son of two fathers, by two persons " 'will be presently declared, and women with the sanction of " 'their husbands are competent to adopt.' He then quotes the " same passage of Vasishtha's, and as he put upon it with respect " to *giving* the interpretation that the permission was only " needed when the husband was alive, or not absent on pilgrim- " age, it seems reasonable to suppose that he would have put the " same construction upon it if he had considered more at length " the *receiving* of a son. It would be almost impossible, but " certainly unreasonable, to construe it differently in the two " places. We have already seen that this is the interpretation " put by Nanda Pandit upon his doctrines. The opposite inter- " pretation was put upon them by the Pandits in the case in " Knapp, and we are bound to confess that until we reconsidered " the passage after the second argument, we failed to see its real " force and effect. The proper conclusion seems to be, that the " opinion of Devendra Bhattya must have been, that the assent of " the husband stood upon precisely the same footing, and was of " the same scope in the cases of 'giving and receiving,' for if the " words of Vasishtha requires this explanation in the one " case, they require it in the other." Mad. H. C. Rep., Vol. II, pp. 218 to 220; see also p. 229, but the case begins in page 206.

In addition to the reasons assigned by the Madras High Court, I take the liberty to observe that Devendra Bhattya did not, in clauses iv and vii, Sec. I of his Dattaka Chandrika, dwell

upon the question of a widow's power to adopt without the authority of her husband. Perhaps in his time adoption by widows without permission from their husbands was so much prevalent, that he considered it unnecessary to enter into that question at all. But the giving of a son by a widow being injurious to her husband, the author took a good deal of trouble to convince us that she could do so. The said author, by saying " that a woman with the sanction of her husband is competent to adopt," and then by quoting Vasishtha—" *Let not a woman either give or receive a son in adoption unless with the assent of her husband,*" simply meant that, " *let not a woman in the lifetime of her husband either give or receive a son in adoption unless with the assent of her husband.*" By putting this construction, we not only make the author consistent throughout, but also he becomes supported in his view by the authors of the Mayukshya, Kaustabha, and Viramitrodoya. Neither Devendra Bhattya, nor the authors of those books, were writers of the Bengal school, nor were they Bengalees themselves. If the Dattaka Chandrika can be accepted as the paramount authority in Bengal, all the authors of Southern India, who coincide with the opinions of Devendra Bhattya, must be accepted *also* as authorities. The authors of those works explain the text of Vasishtha—" Let not a woman " either give or receive a son in adoption unless with the assent " of her husband,"—by saying, that it applies to the adoption made during the husband's lifetime, and is not to be taken to restrict the widow's power to do that which *the general Hindu law prescribes as beneficial to her husband's soul.* The Madras High Court, after considering all the authorities on the subject, proceeds thus :—" They all point to the necessity of the permission on " account of the woman's dependence being all alike based upon " the exposition of the passage of Vasishtha. The Smriti Chan- " drika speaks of the need of an independent male, and does not " seem to care who the male is, and in his later work (Sec. I, " clauses xxxi, xxxii), Devendra Bhattya declares the power " of a woman to give with her husband's permission, if he is " present, and without it if he be dead, have emigrated, or entered " a religious order. As has been before shown, the passage of " Vasishtha must receive the same interpretation as to giving and

"receiving as was clearly the opinion of Nanda Pandit. Then, "in the next Section, is a rule of interpretation very common in "the Hindu law, 'that where there is no absolute prohibi-"tion there is assent,' and in the conclusion of the Section he "considers that, by the use of the disjunctive,—'He whom his "father *or* mother gives,' Yajnyawalcya intended to suggest the "independence of the woman. Vidya Narayan Sawmy construes "the text of Yajnyawalcya in the same manner, and after laying "down in distinct terms the necessity for an adoption, says—'that "'it must be with the assent of the father.' Looking at the whole "course of his reasoning that this sort of adoption was a sub-"stitute for the begetting, and at the fact that he has stated that "the begetting must be with the consent of the father, &c., there "can exist little doubt that he would have applied the *et cetera* to "the case of adoption. It would be wholly contrary to the "reasoning of Hindu writers to make a process declared to be "so imperative depend upon the existence of any particular "person. Mr. Ellis has justly remarked that the genius of Hindu "law allows substitution in almost every conceivable case." Then a little further on the High Court remarks—"the author of "the Dattaka Kaustabha reasons thus:—'The guardianship "'described to exist is merely intended to provide as that of the "'father before marriage was, against the performance of improper "'acts, but seeing that the act of adoption is one plainly enjoined "'and obligatory, no dissent of kinsmen can prevent the widow "'from doing it, and their assent is not needed.' That adoption "is upon the footing of other spiritual duties, for which she does "not require permission and which no dissent of guardians could "prevent her from performing or justify her in not performing. "This doctrine is curiously consistent with that of Devendra "Bhattya, and surely the giving of a son is a matter of at "least as much consequence as the receiving of one; for the "spiritual interests of the living husband may be imperil-"led by the giving, the receiving, if it can do no good, can "at least do no harm."—Mad. H. C. Rep., Vol. II, pp. 229, 230.

That the guardianship was intended to provide against improper acts becomes still more clear from the following

texts of Menu, Yajnyawalcya, and Harita. It was especially intended that the widow might not commit adultery and give birth to bastards.

Menu :—Their fathers protect them in childhood, husbands protect them in youth, their sons protect them in age. A woman is never fit for independence.

Yajnyawalcya in the first chapter of his Code :—"Let her father guard a maiden, let her husband guard a woman; but let her son guard her in age; in failure of these, let her kinsmen protect her."

Harita :—By violating their obligation of fidelity to one only husband, and by receiving the embraces of a stranger, vicious women confound families, for a son begotten by an adulterer, while the husband is alive, is *cunda*, and after his death, a *golaca*; therefore let the husband guard his wife from the assaults of lust. If she be lost through vice, the honor of the family is forfeited; if that be lost, the pure succession of progeny is lost; through that loss the sacraments of deities and of manes are destroyed; those sacraments being destroyed, duty fails; duty failing, the husband's soul is lost; and his soul being lost, everything is lost.

Paithinasi :—Therefore, guard wives, lest mixed classes should spring from them.

All these slokas will be found in pages 109 to 111, Colebrooke's Digest, Vol. II.

It does not require much argument to convince one that a guardian is appointed by a man over his son to look after his moral conduct and education, and not to restrain him from doing what is good and proper. A son or his substitute is essentially necessary for the spiritual welfare of her husband's soul ("why not of her own soul?"), and why should she be subject to the caprices of her husband's kinsmen, who, in ninety-nine cases out of a hundred, try their utmost to deter her from adopting a son. Devendra Bhattya declares a widow to possess the power of giving a son without waiting for the consent of her kinsmen and her husband's kinsmen. If the said author is to be respected in Bengal, she ought to have the same privilege in *receiving* also. Is a Hindoo widow really dependent on her husband's kinsmen now? Can she not demand a partition from her husband's brother? Can she not sell her own life-interest in the property inherited from

her husband for other than allowable causes ? (see Sutherland's Full Bench Ruling, p. 165) Can she not marry another husband ? And if she likes, is she not quite competent to make free love with any man she pleases? The property once vested in her cannot be divested,—see the great unchastity case. (19 W. R., C. P., p. 367.)

If the Hindoo law authorises a Hindoo widow to do all these acts, justice and common sense would require the same law, *nolens volens,* to authorise her to adopt a son without the permission of her husband, not only because the Dattaka Chandrika, as understood by the Madras High Court and the Privy Council, give her that privilege, but because the whole code of universal justice and the whole genius of the Hindoo law as shewn by the extreme spiritual necessity for adoption uniformly point out her competency to adopt without any formal permission from her husband, and that she ought not to be placed under the mercy of her designing and selfish relatives.

It may be argued by some that although the Privy Council and the Madras High Court put the interpretation upon the Dattaka Chandrika favorable to the widow's power to adopt, yet it was merely an *obiter dictum,* and cannot have any weight as an authority. Both the Privy Council and the Madras High Court admitted in their judgment that the Bengal school interprets the text of Vasishtha, "Let not a woman either give or receive " a son in adoption unless with her husband's assent" as requiring an express permission given by the husband in his lifetime but capable of taking effect after his death. I admit they did so, and they did it under the erroneous impression which all of us entertain at the first sight of Colebrooke's Note and the two Behar cases hereafter noticed. Their Lordships have themselves undermined the basis of that erroneous impression. As the question of a widow's power to adopt in Bengal without permission from her husband was not before them, they stated what was the popular opinion in Bengal. If they had the question before them, and considered the Bengal authorities, they could not, without contradicting themselves, come to the conclusion that a Hindoo widow in Bengal cannot adopt a son without the express permission of her husband. As long as the Dattaka Chandrika is the paramount authority in Bengal, so long a widow must be

considered to possess full power to adopt a son without any permission whatever, when it is distinctly laid down by the Privy Council and the Madras High Court that the passage of Vasishtha in the Dattaka Chandrika must receive the same interpretation as to the giving as well as to the receiving. I think it will be the height of injustice to take away the privilege from a widow, which the paramount authority in Bengal accords to her, simply because the Privy Council, carried away by erroneous popular opinion, remarked that, according to the Bengal school, formal permission was necessary. Is not Devendra Bhattya in questions of adoption recognized as the head of that school? J. G. Shome's Report, Vol. II, p. 229; Cal. Law Rep., Vol. IV, p. 538, but see p. 554.

The above *obiter dictum* of the Privy Council can only be accepted on the ground that it is supported by higher authorities than Devendra Bhattya, and where is that authority? I do not think Colebrooke's Digest can overrule the dictum of Devendra Bhattya. Do we not find our Courts always open to conviction? In *Narayani Debya* v. *Hari Kissore Roy* (Sel. Rep., Vol. I, new edition, p. 52, but read 55), it has been held, that the term *mata* in the Mitacshara implies both mother and stepmother. But in spite of that *obiter dictum* of the old Sudder it has been held by a Full Bench of the Calcutta High Court, that the term *mata*, according to the Mitacshara, does not include a stepmother; *vide* Special Number of the Weekly Reporter, p. 173. When we find in this case as well as in others noticed in different places, that our Courts have always changed their opinions when they had appeared to them to be erroneous, we have every reason to hope that the fate of the unfortunate adopted sons would at least be re-opened and discussed again.

The next question arises as to the correctness of the interpretation put upon the passages of the Dattaka Chandrika.

It may be argued that the iv and vii placita of Section I of the Dattaka Chandrika, referred to in the judgment of the Madras High Court, do not seem to support the conclusion to which it came as to the views of Devendra Bhattya,—namely, the opinion of Devendra Bhattya must have been, that the assent of the husband stood precisely upon the same footing, and was of

the same scope in the cases of both giving and receiving; for if the words of Vasishtha require this explanation in the one case (that of giving), they require it in the other. If Devendra Bhattya had entertained the opinion attributed to him as to receiving a son, he would have expressed it in as clear terms as he did in placita xxxi, xxxii, Section I, as to giving a son. Devendra Bhattya had ample opportunity when he treated as to the competency of a woman to take a son in adoption to express the opinion attributed to him by the Madras High Court. The fact that he not only carefully refrained from uttering such a doctrine, but also when in placitum xxiv of the same section he touches upon receiving a son in adoption by a woman, he again says, as mentioned in placitum vii, Sec. I, shows that Devendra Bhattya wanted to relax the doctrine of Vasishtha as to a widow's power to give a son in adoption and to restrict it in the case of receiving (*vide* Bom. H. C. Rep., Vol. VII, pp. 163, 164 —*Narayan Babaji*, alias *Narayan Purosotyam and Sundara Baye*, defendant, appellant). As to the first argument that Devendra Bhattya, in spite of the full opportunity, did not express his opinion as to the competency of a woman to receive a son after her husband's death without any permission, I have already stated that the author was treating the question, whether a woman could, during her husband's lifetime, adopt a son without his consent. Perhaps the widow's power to receive a son was so widely known and accepted in his time that he thought that the subject did not require any expression of opinion from him. That the widow's power to adopt a son without her husband's permission was a recognised fact in his time becomes clear from the anxieties shown by Nanda Pandit in his Dattaka Mimansa to convince the Hindoo public that a widow could not adopt a son with the consent of her husband's kindred. That Devendra Bhattya thought the expression of any opinion on the subject unnecessary is still strengthened by the following remarks of the Privy Council in the *Ramnad* case, as well as by the leading authorities of Southern India. Their Lordships remark :—" Upon the whole, " then, their Lordships are of opinion that there is enough of " positive authority to warrant the proposition that, according " to the law prevalent in the Dravira country, and particularly

"wherein this Ramnad zemindary is situated, a Hindoo widow "not having her husband's permission may, if duly authorised "by his kindred, adopt a son to him." When we find that Devendra Bhattya was an author of Southern India, born with the ideas and associations of that place, and also when it is shown that almost all the authors of Southern India explain the text of Vasishtha by saying that prohibition therein contained refers to a woman having her husband alive, and not to a widow, and when those opinions are sanctioned by the usage of our time even, the only legitimate inference that arises from the silence of Devendra Bhattya, is what I stated before, that he considered the widow's competency to adopt without the permission of her husband as an accepted doctrine of his country and time, which needed no expression of his opinion to support it. On the face of these strong reasons for his silence, there can be no application of the maxim *expressio unius personæ est exclusio alterius.* Then as to the argument that why Devendra Bhattya did not express his opinion on the receiving by a woman in placitum xxiv, of Section I, I should assign the same reason for it. Besides that, in placitum xxiv, Devendra Bhattya, after giving a description of certain ceremonies to be performed with coagulated milk (Dahi, &c.), he showed that a man having no male issue is only competent to adopt and not a woman, thereby showing that if a man had two wives, having sons by one, and daughters or no children by the other, the latter wife cannot adopt a son, "*for to proceed therein would be unproductive of the object.*" The passage in placitum xxiv stands thus:—"So also in the case in question the affiliation of "a son by a woman proceeding legally with the sanction of her "husband to constitute for him male issue only takes place where "no son of that person may exist. But if he have any, although "she may be destitute of the same, such adoption does not obtain, "&c." These passages clearly show that the author was dealing with the competency of a woman to adopt with her husband's permission during his lifetime, and the author's primary object was to show that a husband having a son by one wife could not authorize another childless wife to adopt, and he had no reason in that place to express any opinion as to the widow's competency to adopt. To preserve the consistency of the whole code

of Devendra Bhattya, as well as for the foregoing reasons, it is more reasonable to attribute to him the opinion which the Madras High Court gave, than to say that he interpreted the passage of Vasishtha in two different ways. The fundamental principle of construing a law is, that one part of it may not be destroyed by the other. Here, if we construe the passages of Devendra Bhattya in placitum vii, Sec. I, that he interpreted the passage of Vasishtha to mean that a woman having her husband living could not, during his lifetime only, adopt without his permission, and that as to the widow's competency to adopt the author did not express any opinion for the reasons I have already stated, and left it to be inferred, if necessary, from verses xxxi and xxxii, as was eventually done by the Madras High Court and the Privy Council, then by this interpretation the consistency of the work is entirely preserved. The Madras High Court does not, for the first time, attribute this opinion to Devendra Bhattya, but the Bombay High Court also quotes the following passage from Sir W. H. Macnaghten's Principles of the Hindu Law, 2nd edition, page 68 note, and page 74 of G. Tarkalankar's Edition, as an authority to show that the right of adoption without the permission of the husband does appertain to a widow (Bom. H. C. Rep., Vol. V, A.C. J., pp. 186, 187.) The beginning of the case is at page 181) :— "According to the Vyavahara Kaustabha and Mayukshya, "authorities of the highest repute among the Mahrattas, which in "this respect follow the doctrine of the Dattaka Chandrika, the "sanction of the husband is not requisite." The Court then quotes Section I, arts. 31, 32 of the Dattaka Chandrika. Thus it will be seen that Sir W. H. Macnaghten, and in 1868 the Bombay High Court, attributed the same opinion to Devendra Bhattya as the Madras High Court did in the great *Ramnad* case. If Devendra Bhattya really entertained an opinion inconsistent with that of the other authors, and approved doctrines of his country as to the widow's competency to adopt, he might have easily expressed it in the places where from his silence the Bombay High Court in Vol. VII of its Report, pages 163, 164, infers that the author intended to expand the text of Vasishtha in the case of a woman giving a son, and restricted it in the case of a woman taking a son in adoption. *Expressio unius est personee exclusio alterius*, like *factum*

valet, is indeed a dangerous weapon in the hands of a man who is determined to come to a particular conclusion, and only seeks for a reason to come to it. Jagannatha and Srikrisna Tarkalankar, whenever they found themselves in difficulties, took up the latter to beat down their antagonist. If we construe the passage of Vasishtha in the way in which Hindoo law is generally interpreted, and if we look to the paramount necessity for an adoption, we must interpret the said passage to mean, as I have already stated, that a married woman having her husband living cannot adopt without her husband's permission. The maxim *expressio unius est personee exclusio alterius* does not always logically hold good. For, if I were to say all human beings are animals, it does not follow therefrom that beasts are not animals. In 1877 the Bombay High Court again concurred with the Madras High Court with regard to the opinion attributed to Devendra Bhattya as to the giving and receiving of a son by a widow, and remarks :—

" According to Vasishtha, quoted in the Dattaka Chandrika, a " woman is not either to give or take an adopted son without " the assent of her husband, and though Devendra Bhattya urges " that non-prohibition may constitute assent, he applies this " only to the cases of the husband being dead or having emi- " grated or entered a religious order." (Ind. Law Rep., Vol. II, Bom. Series, p. 377, but see p. 380). So we find the Bombay High Court in 1868, and in 1877, the Madras High Court, the Privy Council, Sir W. H. Macnaghten, p. 74 or 68, and the Vyavastha Darpana (see page 797), all in one voice declaring that, according to Devendra Bhattya, the absence of prohibition does constitute assent. Pandit Bharat Shiromany also entertains the same opinion.

In the case of *Lakshmappa* v. *Ramava* and others (Bom. H. C. Rep., Vol. XII, p. 364, A. C. J.; but see also pp. 394 and 395), the Bombay High Court again attributed the same opinion to Devendra Bhattya as the Madras High Court did in the great *Ramnad* case, with this difference that it thought the maxim " *Intention of another not prohibited is sanctioned* " cannot apply to the case of a widow giving her only son in adoption, because it could not be supposed that the said maxim could empower her to do that which in verse xxix Devendra Bhattya had ex-

pressly forbidden her husband to do. The Bombay High Court also admitted that the said maxim—"Intention of another, &c.,"—did equally apply to the case of giving as well as receiving, but that its application should have been limited to cases in which such implication could be properly made. By this observation Bombay High Court perhaps meant to say that the maxim should not be applied to those extreme cases where such application would be quite absurd, as in the case of a widow giving her only son in adoption or where the widow's husband expressly prohibited adoption. See also the ruling published in Vol. X Bom. H. C. Rep., A. C. J., p. 235, which clearly shows the competency of the mother to give her son in adoption.

As to the argument that if we follow Devendra Bhattya we shall have to go ahead of all the schools in India, for in that case we shall have to allow a woman during her husband's absence even to adopt a son without his permission, I should observe, the kind of absence contemplated by Devendra Bhattya (মৃতে প্রোষিতে বা) is manifestly not such absence as is compatible with the interchange of letters by post; it means an absence shutting out the wife from communication with her husband when some emergency has arisen, which would justify the receiving of the son. Looking to the extreme necessity for adoption, every Hindoo would admit that it is very desirable that his wife ought to be allowed to adopt a son under the circumstances contemplated by Devendra Bhattya. Devendra Bhattya authorized a wife and a widow to do what every Hindoo would wish.

Let a woman be declared competent to adopt a son under those circumstances in which she would be justified in giving a son in adoption. If an absence incompatible with the interchange of letters by post can authorize a married woman to give a son in adoption during her husband's absence when some emergency has arisen (*vide* Ind. Law Rep., Vol. II, Bom. Series, p. 377, but see p. 380), the same kind of absence and emergency should authorise her to *adopt* a son. If in doing so we go ahead of all other schools, I can only say we do what is just and rational. Then Devendra Bhattya also places the widow's power to adopt above her relations; he does not require the consent of her husband's kinsmen, and in this he

is supported by the author of the Kaustabha, who assigned very good reasons why she should not be made dependent for performing such beneficial act on the selfish and designing relatives of her husband; see Mad. High Court Rep., Vol. II, p. 230. The worst enemy imbued with conservative ideas can at the utmost urge for her dependence and require the consent of her husband's relatives as mentioned by the Privy Council, *i.e.*, in the case of a joint family to seek the consent from an undivided member of the family, and when the family is not joint, the consent of any *sapinda* is sufficient (Ind. App., Vol. III, p. 155; Suth. P. C. Judgment, Vol. II, p. 135), but cannot take away her privilege altogether; at any rate, as in Dravira, she ought to be allowed to adopt with the consent of her husband's kinsmen.

The above doctrine of the Privy Council as to the necessity of an undivided kinsman's consent, when there is any, must be admitted, is capable of inflicting a great injury on a widow, and that the justice and equity which require such consent in other provinces do not exist in Bengal, for here the property of an undivided brother vests in the widow, and not in the surviving brothers, and when a widow being invested with the rights of her husband exercises her power of adoption, she does so in derogation of her own right: *vide Rajah Vellanki Vankata Krisna Row*, plaintiff, and *Venkata Rama Lakashim Narsogy and others*, defendants (Ind. App., Vol. IV, p. 1). The principle upon which any assent was considered necessary appears to be that females on account of their supposed mental weakness are always under tutelage, and are incapable of performing any important act without the advice and assent of a male relation. This advice and assent may be given by one as well as by many, and by a divided member of the family as well as by an undivided member. The assent is not required as a waiver of the rights of the assenting party, but as evidencing the opinion of a masculine mind.

Pandit Bharat Chandra Shiromany also is of opinion that, according to the Dattaka Chandrika, a widow unless prohibited by her husband at the time of his death to adopt a son, can adopt one.

দত্তক চন্দ্রিকা।

"কেন পুত্রো দেয় ইত্যাহ শৌনকঃ। নৈকপুত্রেণ কর্ত্তব্যং পুত্রদানং কদাচন। বহুপুত্রেণ কর্ত্তব্যং পুত্রদানং প্রযত্নত ইতি। দ্বিপুত্রস্যাপি পুত্রদানে অপর পুত্রনাশোবংশ বিচ্ছেদমা-শঙ্ক্যাহ বহুপুত্রেণেতি। স্ত্রিয়োস্ত জীবতি ভর্ত্তরি তদনুমতৌ প্রোষিতে মৃতে বা তদনুজ্ঞাং বিনাপি। যথা বশিষ্ঠঃ। ন স্ত্রীপুত্রং দদ্যাৎ প্রতিগৃহ্নীয়াদ্বা অন্যত্রানুজ্ঞনাদ্ভর্ত্তৃরিতি। অনুমতিশ্চ অপ্রতিষেধেহপি ভবতি অপ্রতিষিদ্ধং পরমতমনুমতং ভবতীতি ন্যায়াৎ। নিরপেক্ষ দানমাহ যাজ্ঞবল্ক্যঃ। দদ্যন্মাতা পিতা বা যং সপুত্রো দত্তকোভবেৎ। তথা মাতাপিতৃভ্যামুৎসৃষ্ট স্তয়োরন্য ভবেৎ বেতি ॥"

দত্তক চন্দ্রিকা টীকা (ভরত শীরমণি)।

"তদনুমতাবিতি। ভর্ত্তুঃ প্রধান্যাদিতি। অনুমতিশ্চেতি, তথাচ মরণসময়ে পুত্রংমা-গ্রহীষ্যসীতি প্রতিষেধাভাবেহপি অনুমতিরবি প্রতিপন্নেতি গ্রন্থ কৃতামাশায়ঃ। নিরপেক্ষ দানমিতি। ভর্ত্তুঃ পত্ন্যানুমতি নিরপেক্ষং পত্ন্যা অপি ভর্ত্তুরনুমতি নিরপেক্ষং দান-মিত্যর্থঃ ॥

Pandit Bharat Chandra Shiromany is respected as an authority in Bengal (*vide* Vyavastha Darpana, p. 770; and Rattigan on Adoption, pp. 30-31), and his opinion that a minor can adopt a son was approved by the Privy Council (*vide* W. R., Vol. XXV, p. 235, but see p. 239).

The general Hindoo law for the benefit of her husband's soul gives a very great power to a Hindoo widow in her husband's property than she has for worldly purposes (Suth. P. C. Judgment, Vol. I, p. 476, but see p. 479). Nothing is so much conducive to the spiritual welfare of her husband's soul than the adoption of a son. I do not see why she should be deprived of exercising such a beneficial act which all other schools authorise her. The vague text of Vasishtha has been interpreted in other schools in a way favorable to the widow. The Privy Council and the Madras High Court interpret the passages in the Dattaka Chandrika in the same way. If we interpret the same passage without the aid of any commentator, there is nothing in the language of Vasishtha to say that by the term woman therein used he meant widow also. As far as civil rights are concerned, a wife and a widow are almost distinct beings. The Hindoo writers also divide them into two classes. In Colebrooke's Digest we find one chapter relating to the duties of a *woman*, and the other relating to the duties of a *widow* surviving her husband. In midwifery

or anatomy a *woman* might mean a *widow*, but when we treat of the civil right of that sex and also its status in the society, specially among the Hindoos, the term *woman* in ninety-nine places out of a hundred exclude a *widow*. Even if the term woman include a *widow* in the said text of Vasishtha, which I emphatically deny, nevertheless the assent of the husband therein mentioned ought to be such as is contemplated by the author of the Dattaka Chandrika. "If there be no prohibition, there is assent" on account of the maxim—"The intention of another not prohibited is sanctioned." So the text of Vasishtha, if it at all includes the widow, ought to mean that a *woman* or *widow* cannot, if prohibited by her husband, adopt a son.

That the term *woman* in Vasishtha's text ought not to include a widow becomes still more clear when we come to consider her larger rights to perform the religious duties than what she possessed during her husband's lifetime. As a married woman, she cannot perform the *sradh* ceremony of her father-in-law, but she can do that in her widowed state; so it seems that, as far as religious duties are concerned, she fully represents her husband. When adoption is of so much importance for spiritual purposes, and when a widow seems fully to represent her husband, I do not see why she should be debarred, unless especially permitted by her husband, from adopting a son for the salvation of her own and her husband's soul, and if any permission be considered necessary in a case of such extreme necessity. why that permission should not be of the nature as contemplated by Devendra Bhattya and other writers of the Southern schools, *viz.*, an implied permission on account of the maxim: "The intention of another not prohibited is sanctioned."

In addition to the other arguments, it may be urged against my theory that the Madras High Court and the Privy Council were wrong in holding that when Devendra Bhattya allowed a widow to give a son in adoption without the permission of her husband after his death, it was reasonable to suppose that he would have put upon the text of Vasishtha the same interpretation as he has put upon it with regard to giving, or in other words, he would have declared the competency of a widow to

receive a son also if he had considered the subject at length. It was a mistake to impute this opinion to Devendra Bhattya, for in declaring the widow's competency to give a son he is supported by the text of Yajnyawalcya—"He whom his father or mother gives is a son given;" but as far as receiving is concerned, there is no text to support the opinion attributed to the author. As Yajnyawalcya declares the competency of the mother by the above text, the text of Vasishtha, "Let not a woman either give or receive a son unless with the assent of her husband," in order to make it consistent with Yajnyawalcya, was construed to mean that a woman, during her husband's lifetime, cannot give a son in adoption, but a widow can. If you put this construction upon the text of Vasishtha for one purpose, why should you not put the same construction upon it for the other purpose,—*i.e.*, if the term "woman" therein used does not include a widow for the purpose of giving a son in adoption, why should the same term in the same sentence include a widow with regard to the receiving of a son? If Vasishtha used the term "woman" in a restrictive sense,—*i.e.*, a woman therein used simply meaning a woman having her husband living, no other interpretation ought to be put upon that very term with regard to receiving. You cannot reject one part of Vasishtha's text and accept the other. The fact that there is no other text to restrict the meaning of the term *woman* as far as *receiving* is concerned, ought not to make any difference in the interpretation of the passage; for be it remembered that in putting a restricted sense upon the text of Vasishtha so far as *giving* is concerned, we do not reject any part of that text. We hold that Vasishtha must have meant by the above passage that a woman having her husband living cannot give a son, as otherwise he becomes inconsistent with Yajnyawalcya, which is impossible. According to the rules of construction as it obtains in the Hindoo law, we are bound to interpret the canons of our sages in the way in which they may not be inconsistent with one another; and when inconsistency becomes unavoidable, we accept that canon which agrees with custom, and reject the other on the ground that it has no application in the present age, *Kali Yoog*. It is only when consistency becomes impos-

sible that a text of one *Rishi* (sage) is rejected, and the other which coincides with custom is accepted. We are bound to interpret the texts of the different *Rishis* in such a way that we may make all of them effective. Fortunately, there is no such real inconsistency between Vasishtha and Yajnyawalcya. By the preceding remarks, we do not mean that to render the passages of Vasishtha consistent with those of Yajnyawalcya we ought to construe the texts in this way, for that assumption would indirectly give superiority to Yajnyawalcya. We cannot do that, for, according to the Hindoo law, both the sages are equally infallible and all-knowing and wise. We, instead of making one yield to another, assume that it was extremely impossible for the sages like Vasishtha and Yajnyawalcya to ordain anything inconsistent with each other's opinions. When Yajnyawalcya expressly ordains that a mother can give a son in adoption, Vasishtha must have meant by the passage, "Let not a woman either give or receive a son in adoption without the assent of her lord," that a woman having her husband living cannot without his permission give her son in adoption. He had not the idea of extending his prohibition to a widow, or in other words, we must hold, that both the sages must have meant the same thing,—*i.e.*, a married woman cannot give or receive a son without her husband's permission, but a widowed mother can,—*i.e.*, neither Yajnyawalcya by his text, "He whom his father or mother gives is a son given," meant that a mother during the lifetime of the father could give a son in adoption without her husband's consent, nor the text of Vasishtha intended to convey his prohibition to widowed mother. The text of Menu :—"He whom his father or mother gives as his son, &c." (Chap. IX, sloka 168), may be explained in the same way,—*i.e.*, a widowed mother can give a son, but when the father is alive she cannot do so, or in other words, the term *woman* in Vasishtha's text means *a woman having her husband living*, and the term *mother* in Menu (Chap. IX, sloka 168) and Yajnyawalcya means a *widowed mother*,—*i.e.*, a mother after the death of the father. It will be seen that by this interpretation all the sages become consistent.

That the term *woman* in Vasishtha's text, at any rate as far

as giving is concerned, cannot convey the idea of a *widow*, becomes clear if we read the whole text of the said sage. The text begins thus:—"A son formed of seminal fluids and of "blood proceeds from his father and mother as an effect from "its cause; both parents have power for just reasons to give, "to sell, or to desert him; but let no man give or accept an only "son, since he must remain to raise up a progeny for the "obsequies of ancestors. Nor let a woman either give or "accept a son, unless with the assent of her lord" (Colebrooke's Digest, Vol. II, Sec. 8, p. 387). By the first portion of the text, like Menu and Yajnyawalcya, Vasishtha also gives absolute dominion to both the parents over their son. *Both the parents have power to give, to sell, or to desert him.* If we take the term *woman* to include a *widow*, the above passage becomes inoperative, and the first part of the text becomes neutralised by the latter. So we ought to seek for an interpretation which would make the whole text consistent. This can be easily done by saying, as I have already said in different places, that although both parents have equal dominion over their children, yet a mother, when the father is alive, is dependent on him, or else when she becomes a widow or when her husband is absent, and that absence is of such a nature that there can be no communication between each other (Ind. Law Rep., Vol. II, Bom. Series, pp. 379-380), she becomes the sole mistress of her children. That Vasishtha and other sages accorded to a widowed mother a larger dominion over her children, is borne out by the whole genius of the Hindoo law and custom. The first part of the Vasishtha's text was no doubt intended for the guidance of the sons, and he told them that both your father and mother *can give you* or *sell you* or *desert you*, but the other part being intended for the wife, Vasishtha said to her, "although you have equal rights with your husband over your sons, yet so long your husband lives you are dependant on him, and you are bound to take his permission before you do any important act, and therefore you better not give or receive a son without his permission, but after his death you can do as you like." And by this interpretation of Vasishtha's text, we not only make him consistent, but he becomes supported by Menu and Yajnyawalcya.

"মাতা পিতা বা দদ্যাতাং যমস্তিঃ পুত্রমাপদি।
সদৃশং প্রীতি সংযুক্তং সজ্জেয়ো দত্রিমঃ সুতঃ॥"

(মনু ৯ অধ্যায় ১৬৮ শ্লোক)

কুললুক ভট্ট।

মতেতি। শুক্রশোনিত সম্ভবঃ পুরুষো মাতা পিতৃ নিমিত্তকঃ তস্য প্রদান বিক্রয় পরিত্যাগেষু মাতাপিতরৌ প্রভবত ইতি বশিষ্ট স্মরণাৎ মাতাপিতা বা পরস্পরানুজ্ঞয় যং পুত্রং পরিগ্রহীতুঃ। সমান জাতীয়ং তস্যৈব পুত্রাভাব নিমিত্তায়ামাপদি প্রীতি যুক্তং ন তু ভয়াদিনা উদক পুর্ব্বক দদ্যাৎ স দত্রিমাখ্যঃ পুত্রো বিজ্ঞেয়ঃ।

The text of Menu and its commentary by Kalluka, in which the said commentator, after mentioning the opinion of Vasishtha, accords to both the parents equal dominion, both severally and jointly, over their children, leave no room for saying that by the passage in Vasishtha's text, "both the parents have power, &c.," he (the sage) meant that both the parents jointly have the power to give, sell, or desert, &c., for such construction is not only irrational, but by putting it we make Vasishtha, as far as giving is concerned, inconsistent with the other sages. For be it remembered consistency is the life and soul of the Hindoo rules of construction. It is our primary duty to make the sages consistent. If, for the reasons given, we interpret the passage of Vasishtha in the way stated above as far as *giving* is concerned, by parity of reasoning the same passage ought to convey the same meaning with regard to *receiving* also. There is nothing in the text to show that Vasishtha intended to convey a different meaning by the term *woman* in his text as far as receiving is concerned. If the term *woman* meant a *married woman* with regard to *giving*, it ought to convey the same meaning with regard to *receiving*. Besides, have not the Madras High Court and the Privy Council held, that if the maxim "the intention of another not prohibited is sanctioned" can authorise a widow to give a son in adoption when there is no express permission from her husband, the same maxim ought to authorise a widow to receive a son under the same circumstance; and Devendra Bhattya would have made the same use of this maxim with regard to receiving if he had considered the subject at length; for the maxim goes to support the propositions of *giving* and *receiving* equally. In coming to the opinion with regard to the

giving of a son, Devendra Bhattya must have put as much weight upon the maxim that "intention of another not prohibited is sanctioned" as upon thetext of Yajnyawalcya—"He whom his father or mother gives is a son given." The reason and authorities made use of in according to the 'mother' in contradistinction to the 'woman,' in Vasishtha's text, the privilege of *giving* a son in adoption, might also with equal force be used in giving to the widow the privilege of *receiving* a son in adoption.

I do not see the justice of construing Vasishtha's text so rigorously as the modern lawyers seem to think it has been interpreted by the Bengal school. I say so, because I find none of the leading authors interpret the said text against the competency of the widow. The passages in the Dattaka Chandrika and the Dattaka Mimansa and the texts therein mentioned ordaining the necessity of selecting a boy from the *sapindas*, contain stronger prohibitions than Vasishtha's—"Let not a woman either give or receive a son in adoption unless with the assent of her husband." Sanouca, an infallible sage, like Vasishtha, ordains, "the adoption of a son by a Brahmin must be made from amongst *sapindas* or kinsmen connected by an oblation of food, or on failure of these, one not so connected; otherwise let him not adopt."—Dattaka Chandrika, Sec. I, placitum x, see placitum xx, wherein Devendra Bhattya distinctly, under the authority of Menu and Brihaspati, rules that a brother's son must be first selected in preference to others. Nanda Pandit also holds the same opinion. In the presence of all these authorities, and although Sanouca begins his text by a '*must*,' yet in the case of *Srimati Uma Deyi*, plaintiff, the Privy Council held that "the "text which prescribes preferential adoption of the *sapindas* has "not the force of law." (Ind. App., Vol. V, p. 40.)

When I come to consider the texts of the Hindoo sages and their commentaries independently of the High Court Rulings, I shall then show how words stronger than those of Vasishtha have been construed to be dissuasive and not imperative.

It may be argued that the interpretation put upon the Dattaka Chandrika by the Privy Council and the Madras High Court is nothing but an *obiter dictum*, and as such it cannot overrule the decisions of the Bengal High Court on the point. In

the first place, I contend that such an *obiter dictum* of the Privy Council ought to overrule the Bengal Ruling, if there is any. Because the Dattaka Chandrika being the paramount authority in Dravira as in Bengal, any interpretation which the Dattaka Chandrika received in a Dravira case ought to have the force of law in Bengal also.

Secondly, I contend that the cases accepted as authorities on the point do not refer to Bengal. The first case noticed by Mr. Rattigan is a Behar case; *vide Rajah Shumsher Mul* v. *Ranee Dil Rajkonwur* (Sel. Rep., Vol. II, p. 169, new edition, 216). This case was decided on the vyavastha of the Pandits. The Pandits questioned on the subject returned the following answer: "It is written in the Viramitrodoya and Sanskara Kaustabha "that it is lawful for a widow to adopt a son without the autho-"rity from her husband, provided she had obtained the consent "of her husband's heirs. But as this decision is overruled in "Dattaka Mimansa, a treatise of greater authority, the adoption "of a boy by a widow without any authority from her husband "is illegal and invalid," and in support of this answer, after citing the text of Vasishtha quoted in the Dattaka Mimansa, "Let not a woman either give or receive a son unless with the "assent of her lord," they proceed to argue as follows:—"It "has been argued that this text is applicable solely to women "whose husbands are alive and not to widows, the wife being "alone under the control of the husband; to this it is answered, "the word *woman* is to be taken in a general sense and ap-"plied equally to a widow or to a wife, both being under control, "the widow under that of her husband's kindred. To this "it is urged, in reply, that a widow consequently may adopt a "son with the assent of her husband's relations, but such a "doctrine would be manifestly absurd, for if she could with "the consent of her husband's kindred adopt a son, the word "*husband* must necessarily bear the sense of kindred, which "it does not, and a son so adopted could not confer any benefit "on the deceased husband being adopted without his consent, "whereas a son adopted by a widow with the consent of her "husband is in truth *the son of her lord.*"

The above passages are nearly the re-production of Section I,

placita xvii, xviii of the Dattaka Mimansa. Then comes the case of *Joy Ram Dhami* v. *Musan Dhami* (Sel. Rep., Vol. V, p. 3, new edition). This is a Gya District case. In this case Pandit Lila Dhar holds that, according to the Viramitrodoya, adoption by a widow without her husband's permission is valid; and the Pandit then cites Mitacshara, Chap. I, Sec. XI, clause ix:—" He who is given by his mother with her husband's consent while her husband is absent or incapable though present, or without his assent, after her husband's decease, &c." Perhaps the Pandit comes to the conclusion that if a widow is competent to *give* a son in adoption, she by parity of reasoning is likewise authorised to *receive* one. Then he cites a passage from the text of Sanouca—" She who is barren, &c., having fasted for a son," and states that the right is common to the married woman and the widow. The Zillah Judge held the adoption valid, but the adoption was set aside by the Sudder Court on the vyavastha of its own Pandits. The Sudder Pandits said that they gave their vyavastha on the authority of the Dattaka Chandrika, the Dattaka Mimansa, the Dattaka Didhiti, the Viramitrodoya, and the Mitacshara. But in fact the passages referred to in *Shumsher Mul's* case were quoted from the Dattaka Mimansa alone,—*i. e.*, placita, xvii, xviii of the said book. It seems that another Zillah Pandit, Bohur Bhat, was consulted, and he held that such adoption was valid. The Pandit, disapproving the adoption, simply mentioned the name of the Dattaka Chandrika, perhaps to augment the number of his authorities, but in fact no passage from the Chandrika was cited by him. The other authorities therein cited referred to the question "whether a widow having adopted a boy and made a gift to him could revoke that gift. It will be seen that both these cases, though decided by the Calcutta Sudder Court, came from Behar and were decided on the authority of vyavasthas based alone on the Dattaka Mimansa of Nanda Pandit. According to the Dattaka Mimansa, even with the permission of her husband given during his lifetime, a woman can neither give nor adopt a son. But this opinion is rejected by all the schools. As to the concluding portion of the passages alleged to have been quoted in Rajah *Shumsher Mul's* case (Sel. Rep., Vol. II, p. 216), from the

Dattaka Mimansa—"That a son adopted by a widow with the consent of her husband is in truth the son of her lord—*Rajah Shumsher Mul* v. *Ranee Dilraj Koonwar* (Sel. Rep., Vol. II, p. 169, new edition, p. 216), I deny that any such passage can be found in the said author's book, and it is extremely reasonable that such a passage should not exist there. If the Pandit quotes it as the opinion of Nanda Pandit, I must say that it is a fabrication. Nanda Pandit altogether denies the right of a widow to give or to adopt a son;* see the judgment of the Privy Council and the Madras High Court in the great *Ramnad* case.

As it has been distinctly held by the Madras High Court and the Privy Council that the opinion of Devendra Bhattya and Nanda Pandit must have been that the assent of the husband stood upon precisely the same footing and was of the same scope in the cases of *giving* and *receiving*, and that the Dattaka Chandrika must be considered as an authority for the proposition, that if a man without a male issue died or emigrated, his wife might without sanction adopt a son, so all the rulings accepting the Dattaka Chandrika as an authority for *giving* may be received as an authority for *receiving* also (see Ind. Law Rep., Vol. II, p. 377, but see pp. 379, 380; Bom. Series, see Bom. H. C. Rep., Vol. VIII, A. C. J., 114). The case in Vol. V, Bombay High Court Report, page 181, but see page 186, where the Court quotes Sir W. H. Macnaghten's opinion (second edition, 68 note): "According to the Vyavahara "Kaustabha and Mayukshya, authorities of the highest repute "among the Maharattas, which in this respect follow the doc- "trine of Dattaka Chandrika, the sanction of the husband is not "requisite." The text of the Dattaka Chandrika thus alluded to appears to be Section I, articles 31 and 32, which may be taken as an authority on the competency of a woman in Bengal to adopt a son without authority from her husband. Sir W. H. Macnaghten and the Bombay High Court have understood the Dattaka Chandrika in the way in which it has been inter-

* It is only in times of distress that Nanda Pandit allows a widow to *give* her son in adoption (Sec. IV, v. 12, Dattaka Mimansa). A widow can, under no circumstances, according to the said author, *receive* a son (vv. 15, 16, 17, 18, 19, and 27, Sec. I, Dattaka Mimansa).

preted by the Madras High Court and the Privy Council in the great *Ramnad* case. The author of the Vyavastha Darpana is also of opinion that in Bengal a widow can, without any permission from her husband, give one of her sons in adoption—Vyavastha Darpana, foot-note, p. 762. See also *Lakshmappa* v. *Ramava and others*. (Bom. H. C. Rep., Vol. XII, p. 364 or pp. 68, 69 of this book.)

Now I proceed to examine some of the important rulings of the Bengal Proper in which parties conceded as to the necessity of a formal permission. Those rulings, at the best, can be received as an admission of the interested parties. In *Janoke Debya* v. *Sada Shib Roy*, the Sudder Court of Calcutta decided that as the widow had failed to prove the deed of permission, the adoption made by her was consequently invalid. (Sel. Rep., Vol. I, p. 262, new edition.) It seems the question, whether a widow in Bengal could adopt without the authority from her husband, was not raised in this case, but it was only conceded that she could not.

It was held in the case of *Ballavakanta Chowdry* v. *Krishna Prya Dasi Chowdrain* (Sel. Rep., Vol. VI, p. 270), that the deed of permission not being proved, and the requisite ceremony not having taken place, the adoption must be declared invalid. In this case the adopter was held to be unconscious of what he was doing. A Hindoo of the *telee* caste, inferior to a sudra, a few minutes before his death, was asked, 'Here is the boy you wanted to adopt, now receive him.' The dying man only answered "yes" perhaps "আচ্ছা". This was held insufficient to constitute a valid adoption. The principal reason assigned for invalidating the adoption was, that without the *homa* ceremony no adoption could be valid. Had the case been decided now, the unfortunate adopted boy would not have been, on the score of ceremony, cast upon the world unfit to call any one his own relative; for the Bengal High Court has held that ceremony is not necessary in the case of an adoption by a sudra. (See Ben. Law Rep., Vol. VII, p. 1, App. Civ.; and 15 W. R., C. R., p. 300.) In the case of *Ballavakanta Chowdhry* also, the question as to the widow's power to adopt without the permission of the husband was not raised. This case, properly speaking, does not furnish materials even to argue that the parties conceded

that the widow could not adopt without the permission of her husband; the question was whether the adoption of a boy under the circumstances disclosed in the case could validate the adoption.

Then comes the case of *Gour Nath Chowdhari* (*vide* Sudder Decision for 1852, p. 332). The Sudder Court remarked:— "On reference to Macnaghten, Vol. I, page. 86, we find that it is a "disputed point whether a widow having with the sanction of her "husband adopted one son, and such son dying she is at liberty to "adopt another without having received a conditional permis- "sion to that effect from her husband. According to the doc- "trine of the Dattaka Mimansa, the act would clearly be illegal, "and this work is authoritative on the subject of adoption."

"As it appears from the decision of this Court at page 135, "Vol. I, Sudder Dewani Adawlut Decision, that, on special per- "mission granted, one son may be adopted on the death of an- "other, and no case has been brought forward to show that "without such permission such adoption would be valid; and "further, as it is a principle of Hindu law, that without per- "mission no son can be adopted, it is a fair legal inference that " a second adoption on the death of the first child when the "husband is no longer alive to grant permission to adopt, can- "not be valid; we therefore set aside the alleged adoption of Gouri Nath." See *Gour Nath Chowdri* v. *Anna Purna Chowdrani*, S. D. A., 1852, p. 332.

This case also, like ninety-nine other kindred cases, simply goes to show that the parties under an erroneous impression accepted it to be the law, that formal permission was necessary in Bengal, and, therefore, it was held that the widow having with the sanction of her husband adopted one son, and that son dying, she could not adopt another without having received a conditional permission to that effect from her husband, and the Court held that such an adoption would be invalid according to the doctrines of the Dattaka Mimansa. Nothing can surprise one more than to find that the Dattaka Mimansa is cited as authority to support the above proposition; do we not find that, according to the Dattaka Mimansa, a widow can neither give nor receive a son even with the permission of her husband given during his

lifetime (*vide* Dattaka Mimansa, Sec. I, placita xv, xvi, xvii, and xviii). "'By a man destitute of a son.' From the masculine "gender being here used, it follows that a woman is incompetent "to adopt. Accordingly Vasishtha ordains:—'Let not a woman "either give or receive a son unless with the assent of her hus- "band'" (placitum xv, Dattaka Mimansa, Sec. I.) "From "this the incompetency of a widow is deduced, since the "assent of her husband is impossible" (Dattaka Mimansa, see placitum xvi, Sec. I). "Nor should it be argued that the "assent of the husband is requisite for a woman whose hus- "band is living, because she is subject to control; but not so "the widow, for mention being made of woman in general, "dependency on control is not the cause; and were it, her subjec- "tion to the control of kinsmen exists as shewn in the following "text:—'On default of these the kinsman, &c.'" Dattaka Mimansa, placitum xvii, Sec. I. "If it is contended then that she may "adopt a son with the assent of the kinsmen even, it is wrong, "for the term 'husband' would become indefinite, &c." (Dattaka Mimansa, Sec. I, placitum xviii). "Since the only power "of widows is fixed to be that of using property during their "lives, it is established that they have not power to adopt "a son; but it must not be affirmed that it follows that, in the "same manner, women also whose husbands are living are in- "competent" (see placitum xxvii, Sec. I, Dattaka Mimansa). These passages will convince any one that adoption by a widow is altogether prohibited by the Dattaka Mimansa. See the great *Ramnad* case, reported in Vol. II, Mad. H. C. Rep., p. 206, and the Privy Council judgment on the same (P. C. Judgment, Vol. II, p. 135, but see p. 141). Perhaps by the above passages the author means that a permission given by the husband is not capable of taking effect after his death; so by altogether prohibiting adoption by a widow, and feeling its hard consequence upon society, the author has sanctioned the affiliation of a *kritrima* son as ordained by Parasara.

Justice Dwarkanath Mitter, in the case of *Rajah Opendra Lall Roy* v. *Sreemutty Rani Prosono Moyee* (B. L. R., Vol. I, A. C. J., 221; S. C., see also W. R., Vol. X, p. 347), in dealing with the question, whether the adoption of an only son can be held valid or

not, remarked as follows:—"Suppose, for instance, a son has been "adopted by a childless widow *without the permission of her* "*husband*, the prohibition against such an adoption is contained "in the following passage:—'Let not a woman either give or "'receive a son in adoption unless with the assent of her husband.' "Can it be said that such an adoption would be valid in law? It "will be observed that the language employed in the preceding "text* is precisely similar to that employed in the text prohi-"biting the adoption of an only son, and it would be difficult to "suggest a reason why an adoption invalidated in the one case "for temporal purposes upon considerations arising out of a "religious view of the matter should not be equally invalidated "in the other case upon similar grounds." I do not think any one would argue from the above remarks that Justice Mitter authoritatively lays it down that permission is essentially necessary for a widow to empower her to adopt a son. The above remarks at best are nothing but a mere *obiter dictum* of the learned Judge. Like other Judges, without entering into the question as to the widow's competency to adopt without a formal permission from her husband, he was influenced by the existing popular notion that such permission was necessary. The acute mind of Justice Mitter, however, could clearly see that if the prohibition contained in the first passage of Vasishtha as to the adoption of an only son be taken to be dissuasive and binding upon the conscience only, the passage immediately following it prohibiting the adoption by a woman without the permission of her lord, ought to convey the same meaning. But, as to the adoption of an only son, Justice Mitter certainly was in the minority. It has been held by series of rulings of the Calcutta High Court, as well as of the other High Courts, that the prohibition as to the adoption of an only son is merely dissuasive. I agree with Justice Mitter so far that both the prohibitions alluded to in his judgment stand precisely upon the same footing. It will be seen that Justice Mitter does not mean to say that those passages

* But let no woman give or accept an only son, since he must remain to raise up progeny for the obsequies of ancestors, nor let a woman either give or accept a son unless with the assent of her lord (Vasishtha, see Colebrooke's Dig., Vol II, Bk. V, Chap. IV, Sec. VIII, p. 387).

cannot be interpreted as being merely dissuasive, but that the sum and substance of his argument is, that because one part of it has been construed to be imperative, the other part ought to be taken to have the same imperative force. With due deference to Justice Mitter's opinion, I beg to submit, that when language stronger than this, as in the case of adopting nearer kinsmen in preference to remoter ones, especially with regard to the right of uterine brother's son to be adopted in preference to a stranger (*vide* Dattaka Chandrika, Sec I, vv. 10, 11, 12, 13, 14, 15, 16 ; Dattaka Mimansa, Sec. II, vv. 2 to 16 ; Sutherland's Synopsis, Head Second), has been construed to be merely dissuasive and binding upon the conscience only (vide *Sremotee Uma Deyi*, plaintiff, v. *Goluch Annanda Dass Mohapatra*, defendant—Ind. App., Vol. V, p. 40), the whole text of Vasishtha, which begins with a simple "Let not," ought to be interpreted in the same way.*

Against this ruling of the Calcutta High Court we have in the Bengal side the following decisions :—*Devi Doyal* v. *Hur Hur Sing* (Sel. Rep., Vol. IV, 407). In this case the power of a widow to give her only son in adoption in *Dwyamushyayana* form who was duly authorised by her husband, has been conceded, and in *Sremottee Joymonee Dasi* v. *Sremottee Siba Sundari Dasi* (I Fulton, 75) Sir Edward Ryan, then Chief Justice of the Calcutta Supreme Court, remarks as follows :—"On the first point the adoption of an only son is no doubt rendered blameable by Hindoo law, but when done, it is valid."

Again, in *Mussumat Tikday* v. *Harro Lall* (March, 1864, W. R., Sp. No., p. 133), decided by the Bengal High Court, Justice Raikes observes :—"Though it is allowed that a father should not give up his only son for adoption by another, we are not shown any reliable authority on the illegality of such selection when once made and acted upon." The Bombay High Court, by a recent decision, held such an adoption to be valid—*Vyankatrav Anandrav Nimbalkar* v. *Jayavantrav* (4th September, 1867, Vol. IV, Bom. H. C. Rep., 191).

* Since this decision of Justice Mitter, the Calcutta High Court, in another case, has also held, that the adoption of an only son is invalid—Ind. Law Rep., Vol. III, p. 443, Cal. Series.

In the Punjab, the adoption of an only son has been maintained—*Makhen Lall* v. *Shukea* (Punjab Record, Vol. V, p. 56) In Madras also, the High Court, by the following recent rulings, has held the adoption of an only son to be valid—*vide China Gaundan and another* v. *Kumara Gaundan* (Mad. H. C. Rep., Vol. I, p. 54), and *Singama* v. *Vengamuri Venkata Churli* (Mad. H. C. Rep., Vol. IV, p. 171).

So it will be seen that, if there are two decisions of the Calcutta Hight Court disapproving of such an adoption and holding the prohibition of Vasishtha to be imperative, there are dozens from the other High Courts laying down a contrary doctrine. Whether the text of Vasishtha be interpreted as imperative or dissuasive, we lose nothing. For we contend that the term 'women,' therein used, does not include a 'widow,' and that a widow's power to adopt is based upon the extreme necessity for adoption, and is supported by the whole genius of the Hindoo law. If it be argued in the language of their Lordships in the great *Ramnad* case that "upon a careful review of all the writers it appears that the difference relates rather to what shall be taken to constitute in cases of necessity evidence of authority of the husband than to the authority to adopt being independent of her husband," I would say that if any permission be considered necessary, let that permission be of the nature contemplated by, Devendra Bhattya, *viz.*, the absence of prohibition is permission or in other words, let there be a legal presumption of such permission as advocated by the Dattaka Chandrika and other writers.

With due deference to their Lordships' opinion, I beg to submit that the majority of the writers, in according to a widow the power of adoption, principally base their argument on the extreme spiritual necessity for a son, and then, as if to meet their antagonists on all points, they submit that, if permission be considered necessary, let there be a legal presumption of it. When we come to consider the fact of our *Rishis* ordaining a wife to be one half of her husband's body, and declaring her equally liable for the pure and impure acts of her husband's, and on the death or absence of the husband according her the liberty. of giving her sons in adoption independently of her husband,

it becomes clear that the right of adoption appertains to a widow as much as to a man.

The cases noted in the margin,* like the case of *Gour Nath Chowdhari* (Sudder Dewani Adalat Report, 1852, p. 332), do indeed go to show that the Judges, who decided these cases, were of opinion that formal permission of the husband was essentially necessary to constitute a valid adoption, but neither in these nor in others, excepting the cases of *Shumsher Mul* and *Joy Ram Dhami,* the question as to a widow's power to adopt without permission was directly raised and properly discussed. In all these cases, both the Bench and the Bar assumed that permission was necessary. As since the decision of those two Behar cases and of *Rajah Heman Chal Sing,* the question, as to the widow's competency in Bengal to adopt without her husband's permission, seems to have been neither raised nor discussed in any case, I have every reason to suppose that all the cases in which the Judges, without entering into the question, indirectly assumed the non-competency of the widow to adopt, have followed the doctrine laid down in the cases noted in the margin,† but as these cases were erroneously decided according to the Vyavastha of the Dattaka Mimansa, which has no application in Bengal, and which, moreover, does away altogether with the adoption by a widow, I do not think that they, and others by which they were followed, can be taken as a bar to the opening of the question, whether according to the authority of the Dattaka Chandrika, a widow can, without formal permission from the husband, adopt a son, and whether the Dattaka Chandrika is of paramount authority in Bengal or not.

That the Dattaka Chandrika is of paramount authority in

* *Purna Nanda Bhattacharjee, guardian of Krisna Nad Chowdhari, appellant,* v. *Uma Kanta Lahiri and others, respondents* (Sudder Dewani Adalat Report, Vol. IV, pp. 318, 319; Vyavastha Darpana, p. 816); *Mohendra Lall Mukerji* v. *Rukmini Debya* (Coryton's Report in High Court, Vol. I, p. 42; Vyavastha Darpana, p. 814: W. R., 15, P. C., 16; S. D. D., 1852, p. 332; Suth. P. C. Judgment, Vol. II, p. 219).

† (1) *Joy Ram Dhami,* appellant (5 Sel. Rep., p. 3, new edition).
(2) *Shum Sher Mul,* appellant (2 Sel. Rep., p. 169; new edition, p. 216).
(3) *Rajah Heman Chal Sing,* appellant (Suth. P. C. Judgment, Vol. I, p. 4).

Bengal has been distinctly held in the great *Ramnad* case. See also Vyavastha Darpana, p. 1041, and the Privy Council Judgment, Vol. II, pp. 140, 141.

"The doctrines of the Dattaka Mimansa are also respected "and followed in this country, with the exception of such of "them as are contrary to the doctrines of the Dattaka Chan- "drika—Vyavastha Darpana, foot-note, p. 1041." Baboo Sayama Charan Sirkar is of opinion that in Bengal and Dravira (Deccan) Dattaka Chandrika is respected and followed in preference to the Dattaka Mimansa and the other works on the subject— "The adoption rules followed in Bengal are the same as in force "and acted upon in Dravira (Deccan); whereas, in the other "schools, the Dattaka Mimansa being followed in preference to "the other works, the differences (in the doctrines of adoption) "between those schools and of the Bengal or Dravira (Deccan) "schools are the same as those between Dattaka Chandrika and "Dattaka Mimansa; of these the material ones are as follows:— "In the schools, other than in Bengal and Dravira, a *dattaka* son "must be adopted previous to the initiation by the ceremony of "tonsure, and before the fifth year of his age, and although a "boy, whose tonsure has been performed within the fifth year "of his age in the family of his natural father, may be adopted, "yet he cannot become a *dattaka* son in the ordinary form, but "must be considered an *anitya dwyamushayana*, notwith- "standing the tonsure be repeated in the family of the adopter; "whereas in Bengal and in Dravira (Deccan) a twice-born man "may adopt a son before his *uponayan*, and a *Soodra* before "the marriage of the boy. In the two latter schools a wife "cannot adopt a son without her husband's consent or authority; "whereas in the Benares and other provinces, she can do so with "the consent of the nearest-of-kin."—(Vyavastha Darpana, pp. 1041-1042.) Colebrooke remarked on a case, quoted at p. 92, Vol. II, Strange's Hindu Law:—"The followers of the Mitac- "shara in the Benares and Maharatta schools admit the widow's "power of adoption without authority from her husband, if she "have the sanction of his kindred." But before the decision in the *Ramnad* case, this exposition of the law, so far as the Benares school was concerned, was considered incorrect as being

opposed to both the original treatises as well as to decided cases. Sir W. H. Macnaghten is, on the other hand, of opinion that, according to the authorities which are followed in Bengal and Benares, a woman is competent, after the death of her husband, to adopt a son, provided he gave her permission to do so during his lifetime. (Macnaghten's Hindu Law, pp. 98-100.) When we come to read Sir W. H. Macnaghten's remarks, quoted by the Bombay High Court (Bom. H. C. Rep., Vol. V, A. C. J., p. 186), to the effect that, "according to the doctrine of the Vyavahara Kaustabha and Mayukshya, which in this respect follow the doctrine of the Dattaka Chandrika, the sanction of the husband is not requisite," one finds himself at a loss to ascertain the definite opinion of the author about a widow's power to adopt. It is admitted by all, that the Dattaka Chandrika is of paramount authority in Bengal. Sir W. H. Macnaghten also admits that, according to the said work, the sanction of the husband is not requisite (Sir W. H. Macnaghten's Principles of Hindu Law, 2nd edn., p. 68, foot-note; see Grish Chunder Tarkalanka's edition, p. 74), then how he could in the same work hold that, according to the authorities which are followed in Bengal and Benares, a woman is competent, after the death of her husband, to adopt a son, *provided he gave permission to do so during his lifetime* (pp. 98-100, Macnaghten's Principles of Hindu Law). Perhaps, when Sir W. H. Macnaghten remarked that, according to the authorities followed in Bengal, a woman is competent, *after the death of her husband, to adopt a son, provided he gave permission* erroneously like others, he (the author) meant that she could do so according to the doctrine of the Dattaka Mimansa, and he might have also based his opinion on *Joyram Dhamee* and *Sham Sher Mull's* case: he must have been further of opinion that the Dattaka Chandrika was not of any authority in Bengal. Now I would ask my indulgent reader to judge what weight ought to be given to the principle laid down by Sir W. H. Macnaghten that, "according to the authorities in Bengal, a widow can only adopt with the permission of her husband." It must be admitted now that the opinion of Macnaghten, that a widow in Benares is incompetent to adopt without formal permission, has been destroyed by the remarks of the Privy Council in the great *Ramnad* case (Suth.

P. C. Judgment, Vol. II, p. 135). Do not these inconsistent opinions at least go to show that the question, as to the widow's competency to adopt, did not receive that amount of attention from these eminent men as it deserved?

In spite of the unassailable and clear opinion of the author of the Dattaka Chandrika (*vide* Sec. I, placita xxxi, xxxii), and other unimpeachable canons of the Hindoo sages and doctrines of eminent commentators quoted below, Sir W. H. Macnaghten has held that a widow in Bengal and Benares cannot even give a son in adoption (*vide* Dattaka Chandrika, Vol. I, Sec. I, placita xxxi to xxxii, and Yajnyawalcya there quoted; Mitacshara, Sec. XI, pp. 69 to 73; Menu, Chap. IX, sloka 168). All these authorities enunciate one universal rule as to the widow's competency to give a son in adoption—see also Vyavastha Darpana, p. 762, foot-note—where the opinion of Sir W. H. Macnaghten is condemned as incorrect as far as Bengal is concerned—see also the Indian Law Report, Vol. II, Bom. Series, p. 377—where it was held that a wife without her husband's consent cannot give a son in adoption, and the Dattaka Chandrika there qouted.

*Macnaghten's Principles of Hindoo Law, 108.

The ruling in Vol. X, Bombay High Court Report, A. C. J., p. 235, clearly shows the competency of the mother. I think in the presence of these authorities there cannot be two opinions as to the competency of the mother (after the death of the father) to give her son in adoption. See also *Lukshmappa* v. *Ramavu and others*, Bom. H. C. Rep., Vol. XII, p. 364.

Now, as to the opinion of Baboo Sayama Charan Sirkar in pp. 1041 and 1042 of the Vyavastha Darpana, if I can show that in Dravira a widow can adopt without the permission of her husband when she has not been expressly prohibited to do so (*vide Ramnad's* case, P. C. Judgment, Vol. II, p. 135; also Mad. H. C. Rep., Vol. II, p. 206), then it must be admitted that Baboo Sayama Charan has made a mistake in holding that in Dravira a widow cannot adopt without her husband's permission; Baboo Sayama Charan, however, admits that the rules of adoption in Bengal and Dravira are the same. Now if I succeed to show that, not only according to the Dravira school, a widow *can adopt without her husband's permission, but that,*

according to the Dattaka Chandrika, she can do so, and that the Dattaka Chandrika is the paramount authority in Bengal, I do not see why an adoption made by a widow in Bengal, without her husband's permission, should be made invalid. I do not think any one would give preference to Jagannatha over Devendra Bhattya.

Baboo Sayama Charan Sirkar, with regard to *Gouri Nath Chowdhry's* case (*vide* Sudder Dewani Decision, 1852, p. 332), in which it was held that, without a conditional permission, a widow cannot adopt a son after the death of the first adopted son, remarks:—"The above decision is quite correct according "to the Dattaka Mimansa, but it does not appear to be so "according to the Dattaka Chandrika, which is adhered to in "Bengal in preference to the former, and which, being silent in "the matter, may be construed to permit at least not to prohibit "the adoption in question, inasmuch as the same work has laid "it down, that if there be no prohibition even there is assent "on account of the maxim, 'The intention of another not "'prohibited is sanctioned'—(Dattaka Chandrika, Sec. I, placi- "tum xxxii). Thus when the act is not prohibited by Dattaka "Chandrika, but it is expressly sanctioned by the Vivada Bhan- "garnava, the practice of the act should be allowed in Bengal "by the dispensers of justice, more especially when it is reason- "able as well as religious. Thus Vrihaspati, 'a decision must "'not be made solely by having recourse to the letter of the "'written code; since if no decision were made according to the "'reason of the law there might be failure of justice, &c.'"—(Vyavastha Darpana, p. 797). If Baboo Sayama Charan had carefully considered placita vi, vii, and xxxii of the Dattaka Chandrika, he might have found that the reasons which he assigned to support that conditional permission is not necessary, would have gone to convince him that on account of the maxim—"intention of another not prohibited is sanctioned"—no formal permission is at all necessary for a widow to adopt a son; for if she can give a son in adoption in the absence of express prohibition on account of the maxim quoted above, *à fortiori* she ought to be allowed to receive a son under the same circumstances, considering also that a son is essentially necessary for the spiritual benefit of the widow's husband, and such adoption being held

to be a positive act (নিত্যধর্ম্ম), it becomes an imperative obligation on the part of the widow whether she has express permission or not—(*vide* Vyavastha Darpana, pp. 770 to 776). In the case of *Rajendra Narayan Lahiry* v. *Saroda Soondari Dabi* (15 W. R., p. 548), it was held that a childless Hindoo widow is bound to adopt a son if at all she is anxious for her own salvation, and what is required to be done for that end is not *optional but an imperative* obligation. But see the case of *Daya Mayi* v. *Rash Behari* (29th September, 1852, S. D. Rep., p. 1001), where Sir R. Barlow held, that a widow is not bound to adopt a son against her own wishes, though possessed of a deed of permission from her husband. I think in the face of the subsequent ruling published in Vol. XV, Weekly Reporter, the rule laid down by Sir Robert Barlow cannot be accepted as authority. The rule laid down in *Rajendra Narayan Lahiri's* case is no doubt consistent with the general spirit of the Hindoo law. Although a widow cannot be compelled to exercise the power of adoption against her own wishes (*vide* Bom. H. C. Rep., Vol. XI, pp. 199 to 202), yet, for that reason, it cannot be said that it is not a positive act, and that the non-performance of it would not bring sin upon her according to the Hindoo *shastras*. *Vide* Vrihaspati cited in Colebrooke's Dig., Vol. II, Chap. VIII, Bk. V, p. 522, and the texts quoted in pages 419 to 421 of that work and volume.

The Law Reports noted in the margin* will be searched in vain to find any case excepting those two Behar cases decided on the vyavastha of the Dattaka Mimansa, whereby the widow's competency or non-competency in Bengal to adopt without the authority from her husband was decided, or the Dattaka Chandrika was interpreted as being against the widow's power to adopt without the permission of her husband.

* Select Report, Vols. I to VII,
Marshal's Report—
Sudder Dewani decision for 1853.
Do. do. do. 1858.
Do. do. do. 1857.
Do. do. do. 1856.
[See page 196.
Do. do. do. 1861.
Do. do. do. 1862.

Then comes the case of *Rajah Hemanchal Sing* (Suth. P. C. Judgment, Vol. I, p. 4). It was a Bareilly case, but decided by the Sudder Dewani Adalat of Bengal, and eventually by the Privy Council. In this case it was held, "that a

widow could not adopt a son without the authority from her husband, and *Shum Sher Mul's* case was cited as an authority. The Lords of the Privy Council remarked:—"The opinion of "Pandits of the Sudder Court, both in this case and in the case "of *Shum Sher Mul*, and that of the Pandit of the Provincial "Court of Benares in the latter, appear to be entitled to more "credit than those of the Pandits of the Zillah and Provincial "Courts of Etwa and Bareilly, and that of the Civil Court of "Benares." The date of the decision of the Sudder Dewani in *Hemanchal Sing's* case is not to be found in the Privy Council judgment. *Shum Sher Mul's* case was decided in 1816. The date of the Privy Council judgment in *Hemanchal Sing's* case is 6th January, 1834, and if we allow that the appeal was pending for at least ten years before the Privy Council, it becomes very probable that the same Pandit, who gave vyavastha in *Shum Sher Mul's* case, gave vyavastha in *Hemanchal Sing's* case also; and the same Pandit might have given the vyavastha in *Joy Ram Dhami's* case, for that case bears the date 14th January, 1830. In *Hemanchal Sing's* case, the Sudder Pandit was opposed by the Pandits of Etwa, Bareilly, and Benares. The vyavasthas in *Joy Ram Dhami's* case were not also unanimous. Is it not a very strange coincidence that in both these leading cases, *viz.*, *Joy Ram Dhami* and *Shum Sher Mul*, wherein the Court Pandit gave vyavastha against the adoption—the plaintiff claiming as the adopted son, should be a pauper in the one, and in the other, the plaintiff Shum Sher Mul, representing the adopted son of Rani Bakhta Kunwar, and claiming the property as son of the said adopted son, should institute the suit for possession of the property after having been released from an imprisonment of seven years, from the Oudh King's prison, and the defendants should be in possession of the property. Several decisions of the Bengal Sudder and High Court may be cited, showing that the parties conceded that a widow in Bengal cannot adopt without the previous authority of her husband, and the public are at liberty to draw any conclusion from them they like. In my humble opinion it proves nothing but the ignorance of the Bench and the Bar. Perhaps, previous to the ruling of *Shambhu Chandra* v. *Narayani Debya*, no one thought that, in contravention of the rules laid down in Dayabhaga, an adopted son could

in Bengal succeed not only lineally, but also collaterally, to the inheritance of his adoptive father's relations.

The case of *Guru Prosad Bose,* appellant (Sudder Dewani Decision for 1860, p. 411), proves that even in questions of law it is very difficult for the human mind to get rid of an opinion when it is once impressed on it. It also proves that the materials to come to a right conclusion, in a question of Hindoo law, were very scanty up to that time. Before Justice Dwarkanath Mitter enunciated the doctrine of spiritual benefit, no one thought that a brother's daughter's son could claim as an heir, and it was universally believed that persons not enumerated as heirs in the Mitacshara and Dayabhaga could not be reckoned as such, solely on the ground of conferring spiritual benefit. I shall show in its proper place what alterations have, during the last few years, taken place in the law of adoption also. So I do not think that anything can be made out of the concessions of the parties. It may be argued that, when men like Colebrooke, Strange, and Macnaghten have uniformly held that, according to the Bengal school, a formal permission is essentially necessary, a mere *obiter dictum* of the Privy Council and the Madras High Court cannot overrule the opinions of those eminent Hindoo lawyers. With due deference to their opinion, I do not think that, in the nineteenth century, anyone would blindly follow them when, in adoption questions also their fallibility has been proved—(*vide Ramnad's* case). Macnaghten held, that the eldest son cannot be given in adoption, but it has been recently decided by the Calcutta High Court, that the adoption of the eldest son, when there are several sons, is not invalid by Hindoo law—(Ind. Law Rep; Cal. Series, Vol. II, p. 365). Mr. Mayne, in his Hindu Law, has clearly proved that these so-called five schools have their origin in the imagination of Mr. Colebrooke only. All the commentators base their opinions on the texts of some sages, and when one commentator rejects the opinion of another, he does not do it, as we would reject North-Western Provinces Rent Law in deciding a rent case in Bengal; but he tries to prove that the interpretation given by the commentator is not correct. So in Colebrooke's Digest one would find all the southern authorities cited and discussed as if they were of as much force in Bengal as

the Dayabhaga itself. I, therefore, beg to contend that we cannot reject the opinion of any commentator in a question like the one presented to us without showing that it is incorrect.

Now to come back to the plea of concession. Justice Sambhu Nauth Pandit, in deciding whether an adopted son could succeed to his adoptive maternal grandmother's estate, remarked:—"No "case, either of Bengal or Behar, within the jurisdiction of any "of the two Courts of this Presidency ruling the point, has been "shown. Really such a claim was not likely to be found "so rare, if there was any foundation for it"—*vide* Spl. No. W. R., pp. 121 to 123. In *Tincori Ghosh's* case (*vide* W. R., Vol. III, p. 49), the late Baboo Kissen Kisor Ghosh asserted, that an adopted son cannot perform the *sradh* of his maternal grandmother. The case in Special Number, Weekly Reporter, p. 121, was followed by the Madras High Court, in *China Rama Kristna* (Mad. H. C. Rep., Vol. VII, p. 245). In *Syam Konwar* v. *Gya Din*, the Allahabad High Court held, that an adopted son would succeed to the property to which his adoptive mother succeeded as the heiress of her father (Ind. Law Rep., Vol. I, All. Series, p. 255). Was it not an established opinion that an adopted son could not succeed to the cognates? Justice Pandit, whether rightly or wrongly, was simply carried away by the stream of the popular opinion on the subject. It is very true that such claims were very rare, and I should say the law on this subject may be interpreted in different ways; but does not the weight of opinion now support the claim of the adopted sons to succeed to the property of the cognates and agnates equally like the sons of the body? * Mr. Mayne is of opinion that an adopted son in Bengal can inherit from his maternal grandfather. In spite of the opinion of Macnaghten, based upon an old ruling, that adopted sons succeed collaterally and lineally, but not to cognates, in the case of *Pudma Kunwari Chowdry and another* v. *Jogat Kissore Acharjee*, minor (Shome's Law Rep., Vol. II, p. 229; Cal. Law Rep., Vol. IV, p. 538), the adopted son was held to be a preferential heir to his nephew—*bhaginao*, one's own *bandhu*. So I again say that if, according

* The above is the opinion of the Courts of our time.

to the true construction of the text of Vasishtha and a fair interpretation of the commentaries, a widow in Bengal is entitled to exercise the power of adoption without the permission of her husband, she ought not to be deprived of that privilege, because Mr. Colebrooke or Strange stated that, according to the Bengal school, a formal permission was necessary without assigning any reason or authority for that. This opinion becomes of very little importance when we find that, according to Sir W. H. Macnaghten, the Vyavahara Kaustabha and the Mayuksha, in respect to the widow's power to adopt without any authority from her husband, follow the doctrine of the Dattaka Chandrika, for thereby the author has admitted that, according to the Dattaka Chandrika, also permission is not necessary (see Bom. H. C. Rep., Vol. V, p. 186, A. C. J.)

Before the judgment in the *Tanjore* case, quoted in *Ram Kissore Acharjee* v. *Bhoobun Moyi Debyah* (7th March, 1859, S. D. R., 1859, p. 229), no one ever dreamt that a boy exceeding the age of five years, or whose tonsure ceremony had been performed in the house of his own father, could be adopted, yet no one ventured to say when this opinion was for the first time negatived that,—" O it was the custom of my country." Before Justice Dwarkanath Mitter's judgment in Vol. XIII, Weekly Reporter, and the decision in *Jib Nath Thakur's* case, everyone believed that the list of the heirs given in the Mitacshara and Dayabhaga were exhaustive, but not illustrative, as propounded by Justice Mitter. Hindoo law is involved in such ambiguous texts of our *infallible* sages that, if the acceptation of the erroneous interpretation of any text be construed into custom, then every misinterpretation of the Hindoo law might have been allowed to stand over as sanctioned by custom, and we could not have seen so many changes wrought out in it by the modern rulings of our Courts, and they would have been compelled to do away with the greater portion of our Hindoo law as interpreted by the leading cases of our time. In my humble opinion custom ought to combat against law, and ought to assert its own supremacy over it. Did the Bengalees, in making concessions in their litigations, admit that there was a custom among them that an adoption without permission was invalid? They simply, by implication, admitted

that, according to the law of the land, permission was essentially necessary. If it can be shown that the law of the land is otherwise, I consider that the concession ought not to carry any weight. Be that whatever it may, it does not lie in the mouth of a Bengalee to brag of custom. I think they have estopped themselves in seeking a legislative enactment for Hindoo widow remarriage from pleading of 'custom' in any matter wherein there is Hindoo law. In spite of the old custom, they moved the legislature to enact a law legalizing the Hindoo widow remarriage, and what they then, through their leader, the Bidyásá-gara, stated about the inferiority of custom to law, and which has received legislative sanction, *à fortiori* ought to apply to the subject under our discussion. Bidyáságar, in his book on widow remarriage, Chap. XXIV, English edition, quotes the following authorities to prove that custom is not to be adhered to when it was opposed to law:—

"ধর্ম্মং জিজ্ঞাসমানানাং প্রমাণং পরমং শ্রুতিঃ
দ্বিতীয়ং ধর্ম্মশাস্ত্রন্তু তৃতীয়ং লোক সংগ্রহঃ।।"

(মহাভারত অনুশাসন পর্ব্ব)

"Those that wish to know what *dharmas* are, for them the "Veda is the highest authority, Smriti the second, and custom "the third."

Here we see that custom is held as the weakest authority.

Again—

"ন যত্র সাক্ষদ্বিধয়োন নিষেধাঃ শ্রুতৌ স্মৃতৌ
দেশাচার কুলাচারৈস্তত্র ধর্ম্মোনিরূপ্যতে ॥"

(স্কন্দ পুরাণ)

"Where there are no direct sanctions or prohibitions laid "down in the Veda or Smriti, the *dharmas* are to be ascertained "from an observation of the country and of the family."

Thus it is distinctly stated that custom is to be followed on those matters only on which there are no precepts in the *shastras*.

Further :—

"স্মৃতের্ব্বেদ বিরোধেতু পরিত্যাগো যথাভবেৎ।
তথৈব লৌকিকং বাক্যং স্মৃতিবাধে পরিত্যজেৎ ॥"

(A Smriti quoted in the প্রয়োগ পারিজাত)

"As Smriti is not to be accepted when it is opposed to the "Vedas, so custom is not to be respected when it is at variance "with Smriti."

So when Smriti and custom are opposed to each other, custom is not to be followed.

I do not think there is any decision to the effect that, *according to the custom of Bengal*, a widow has no right to adopt without a formal permission from her husband. All the cases, as I have already said, go to show that the parties conceded as to the necessity for such a permission, because they thought that the law of the land required it. So it cannot be argued from these cases that the custom as to the necessity of the permission has been judicially recognized. "No custom how long soever "continued, which has not been judicially recognized, can be "permitted to prevail against distinct authority"—*vide Narasammai* v. *Balaram Charlu* (Mad. H. C. Rep., Vol. I, p. 420).

In illustration of my contention, that the accepting of an erroneous interpretation of the Hindoo law does not constitute custom, and that our Courts of justice gladly overruled those erroneous interpretations whenever their fallacies were detected, I may again draw my indulgent reader's attention to the *dictum* of the late Justice Pandit in the case reported in the Special Number of the Weekly Reporter, pages 121-123, and the case in Vol. VII, Madras High Court Report, page 245, and as opposed to them, the Full Bench Ruling of the Allahabad High Court, in Indian Law Report, Vol. I, Allahabad Series, page 255, and the opinion expressed by Mr. Mayne in his Hindu Law, as well as the remarks of the Calcutta High Court, in the case published in Vol. IV, Calcutta Law Report, page 538. Then I may refer the case of *Ooman Dutta* v. *Kanyu Sing*, in which it was distinctly held that where there is a *sapinda* boy, he ought to be adopted first. If a *sapinda* is procurable, adoption of any other boy is invalid (Sel. Rep., Vol. III, p. 192); and as opposed to it, the ruling of the Privy Council in Indian Appeal, Vol. V, page 40, laying it down that such adoption is not invalid; and then I may refer to the opinion of the great Macnaghten, that an only son or the eldest son cannot be adopted, and as opposed to it, the ruling of the Calcutta High Court in

Indian Law Report, Vol. II, Calcutta Series, page 365, that the adoption of the eldest son, where there are several sons, is not invalid by Hindoo law. I would also draw the attention of my reader to the conflicting rulings of the different High Courts as to the validity of the adoption of an only son. In the case of *Gouri Prosad* v. *Joymala*, it appears that the husband, after adopting a son in conjunction with one of his wives, had confirmed his permission already given to another wife to adopt, and the adoption made under such permission was declared valid by the Sudder Court (S. D. A. R., Vol. I, p. 136). But this ruling was subsequently set aside when it was found to be incorrect — *vide Rangama v. Atchma*, (Suth. P. C. Judgment, Vol. I, p. 197), and *Manmathanath Deb* v. *Anathnath Deb* (Bourke's Rep., p. 189, O. J.) The fact of a widower's competency to adopt was not also an accepted doctrine of the Hindoo law before the ruling published in Vol. IV, Madras High Court Report, page 270, and I think even now very few widowers would risk the adopting of a boy, and a very few Hindoos also would give boys in adoption to them, unless the adopters ensure the adoption by a testamentary disposition of their property in favor of the adopted. Does not also *Kari Kulitani's* case (W. R., Vol. XIX), conclusively show that be it custom or an acceptation of the erroneous doctrine of law, it must yield to the true exposition of the Hindoo law as understood *by our Judges.* In all these cases, a marked change in the interpretation of the Hindoo law has taken place, although those interpretations were accepted as laws for a series of years without any difference of opinion. As to the question of the widow's competency to adopt without a formal permission in all the three cases in which it was directly raised, *viz.*, *Shum Sher Mul's* case, *Joy Ram Dhami's* case, and the case of *Rajah Hemanchal Sing*, there was a difference of opinion among the Pandits, and in one of these—*i. e.*, *Joy Ram Dhami's* case—one of the Pandits stated that he had heard of adoptions taking place without any permission from the husband.

In the great *Ramnad* case, reported in Vol. II of the Madras High Court Report, p. 206, but see p. 228, the Madras High Court remarks :—

"In a case in which many lofty sentiments of morality were "enunciated, an amusing consciousness runs through the judg- "ment of Lord Eldon, that but for the existence of an extensive "property, the morals of Mr. Welseley Pole's children would have "remained unprotected. So doubtless in the present case, the "deceased Ramaswami would have been left in the quiet posses- "sion of all spiritual benefits derivable from the adoption, if this "extensive property had not been at stake." This opinion is curiously consistent with what we find in actual practice. Many poor widows, where there was nothing to inherit from their husbands, adopted the sons of poorer men, though it was widely known that they had no permission from their husbands, and in some cases they did so with a judicial determination or previous assertion of the non-existence of the permission. Do we not find that the boys adopted under such circumstances are treated in every way as the legally adopted sons of their adoptive fathers? They perform their adoptive fathers' and mothers' *sradhs;* relatives respond to the invitation and eat the dinners given by them; they are married as the adopted sons of their fathers, and if of a different *gotra*, the *poorahits* mention them by the *gotra* of their adoptive fathers, which they cannot do if they hold the adoption invalid; the relatives also come and join in the festival. If a Brahmin, his *upanayan* ceremony is performed according to the *veda* and *gotra* of his adoptive father. Nobody for a moment questions his right to offer the sacred *pinda* to the manes of his adoptive ancestors.

If we consider the texts of our sages, we find nothing in them either permitting or prohibiting a widow to adopt, excepting the indistinct wordings of the sage Vasishtha, which I have shown ought not to apply in the case of a widow. Those who impute the power to a widow to adopt, either with or without the permission from her husband, do so on account of the extreme religious efficacy of adoption, and some presume permission on account of the absence of prohibition.

Jagannatha, who has been overruled on many points of the Hindoo law, and in questions of adoptions specially, argues that adoption being the act of a man, a woman cannot adopt without his permission, and although a widow can perform acts of

religion without the consent given previously by her deceased lord, she cannot without such consent adopt a son given, for the text of Vasishtha expresses :—" Let not a woman either give or receive a son in adoption unless with the assent of her husband " (Colebrooke, Vol. II, p. 388).

Bachaspati Misri* does not connect the terms—" Nor let a woman accept a son," with the words, " unless with the assent of her lord ;" because even though she have the consent of her husband, a woman cannot adopt a son, for she can make no adoption since she is debarred from presenting an oblation to fire with the mysterious words of the *Veda*. Can this legal incompetency be removed by the permission of the husband ? Jagannatha allows an agent for the purpose. Is there any law to support Jagannatha's proposition ? If the husband's permission is necessary, I think there ought to be a permission also authorising a widow to appoint an agent for the performance of the sacred *homa*, or else how the widow, being the agent herself and incompetent to perform certain acts by the operation of the law, can appoint a sub-agent to perform that very act which she herself cannot do. So the arguments of Jagannatha and Bachaspati Misri would rather go to prove that a widow cannot adopt in the *dattaka* form at all. All the authorities attribute the competency of a widow to adopt on account of the extreme necessity for adoption, why do not base that competency on that necessity alone ? Those who require a formal permission from her husband, I must say have allowed their minds to be influenced by the idea of our modern will. Nanda Pandit in doing away with the adoption was certainly influenced by this idea, for in Section I, placitum xxvii, the author in his Dattaka Mimansa says—" Since the (only) power " of widows is fixed to be that using property during their lives, " it is established that they have not power to adopt a son." It is no wonder that Jagannatha, who was contemporaneous with Colebrooke, had allowed the idea of the will stealthily to encroach upon his Hinduised notion. He saw that the Dattaka Mimansa does away with adoption altogether; and if

* Colebrooke, Vol. II, p. 400.

that doctrine were allowed to hold good, it would not only go against his pet doctrine of *factum valet*, but would lay the axe to the root of the testamentary disposition in Bengal, and so he must have introduced this theory of permission capable of taking effect like a will after the death of the husband. Else there is nothing in the text of Vasishtha, if we read the whole of it, to say that he meant to include a widow within that prohibition. According to the Hindoo law, adoption is purely a religious ceremony. The devolution of the property on the adopted is a consequence of that ceremony. Does a Hindoo widow stand in need of any one's permission to perform any of the religious ceremonies enumerated in the Hindoo law? I admit in religious matters she ought to take the consent of her husband, the father, or her son. Catyayana says:—"If a woman, without "the orders of her father, the husband, or the son, should perform "obsequies, such obsequies are of doubtful validity." It does not follow from this that, if all these male members be dead without granting a general permission, she is debarred from performing the religious ceremonies altogether. The passage simply means that while unmarried, she should seek the consent of her father; and in a married state, of her husband; and as a widow, of her son or her father-in-law: and if she has none of them living, either she need not seek the consent of any one else as laid down by the Bombay High Court in Vol. V, Bombay High Court Report, page 186, A. C. J., or, according to the texts of Menu, let her take the consent from some other kinsman (Colebrooke's Dig., Vol. II, p. 137). As she performs other religious ceremonies without her husband's express permission, she ought to be allowed to adopt also, for adoption is as much a religious ceremony as the others are. It is a mistake to suppose that adoption is not necessary for a widow. According to Vrihaspati:—"In scripture, in laws, in sacred ordinances, in "popular usage, a wife is declared by the wise as half the body "of the husband, equally sharing the fruit of pure and impure "acts. Of him whose wife is not deceased, half the body survives, "&c."—(Colebrooke's Dig., Vol. II, Bk. V, Chap. VIII, Sec. I, p. 522). That she is considered half the body of her husband was recognised in *Bhuban Moyi Debya* v. *Ram Kisor Acharjee*

(Suth. P. C. Judgment, Vol. I, p. 574, but see p. 578). "An additional difficulty in holding the estate of the widow of "Bhowani to be divested, as may perhaps be found in the "doctrine of Hindu law that the husband and wife are one." The law of all civilised countries adopts the same principle. If the adoption of a son is of so much necessity as described in the Hindoo law and disclosed by the texts quoted in the margin* (see Colebrooke's Dig., Vol. II, pp. 419-421), it must be the height of injustice to hold that a widow being equally liable for the pure and impure acts of her husband, as shown by the above text of Vrihaspati, cannot do that or remove the consequences of the omissions of her husband, for which her own and her husband's soul are equally liable to be tormented. While a widow lives, the husband himself lives, and her power to adopt a son stands on the rock of the general Hindoo law, and she needs no permission, whether implied or express, by her husband. The remarks of Sayama Charan Sirkar and the text quoted by him in Vyavastha Darpana, pp. 772, 773:—"A son of any des- "cription must be anxious- "ly adopted by a man "destitute of male issue.

302.

* *Menu and Vishnu:*—Since the son (*trayate*) delivers his father from hell named *put*, he was therefore called *putra* by Brahma himself.

303.

Harita:—A certain hell is called *put*, and he who is destitute of male issue, is there tormented; as son is, therefore, called *putra*, because he delivers his father from that region of horror.

304.

Vrihaspati:—Because a son delivers his father from hell called *put* even by the sight of his countenance, therefore is a man solicitous for the birth of a son.

2. A son's son and the son of an appointed daughter, both contribute to the attainment of heavenly bliss; both are equally pronounced fit for inheritance and oblations of funeral cakes.

305.

Menu and Vasishtha:—On him he devolves the burden of debt; by him he procures immortality; through him he joyfully becomes exonerated from every debt to living progenitors.

306.

Sancha and Lichita and Paithinasi:—By a son however produced a father prospers through his oblation of funeral cakes; he becomes exonerated from debt to his progenitors.

307.

Harita:—He who has a son, pure, capable, and virtuous in the first period of life, and perfected by the correction of his own defects, transports his ancestors over the abyss of death.

308.

Sancha and Lichita:—The perpetual support of a consecrated fire and the like, the scriptures and sacrifices rewarded with ample gratuities, do not procure the sixteenth part of the benefit arising from the birth of an eldest son.

2. Heaven is attained through the means of him who is celebrated as the fire of a son and of a grandson, and whose many children and himself while living, had completed the *study* of scripture and the performance of sacrifice.

309.

Sancha and Lichita, Vishnu and Harita:—By a son a man obtains victory over all people; by a son's son he enjoys immortality; and afterwards by the son of that grandson he reaches the solar abode.*

310.

Yajnyawalcya:—Through a son, a son's son, and the son of a grandson, the father or ancestors obtain *bliss in other* worlds, immortality, and heaven, but the double set of oblations and the funeral cake are offered by a man's own son, and other descendants whether principal or subsidiary.†

311.

Vasishtha:—The endless abodes are allotted to those who have male issue. It is recorded that "heaven is not for him who leaves no male progeny." Enemies therefore pronounce *this curse.*—"May they be childless and become evil spirits." The want of male issue is the great cause of destruction: therefore is a son desired. It is declared in the Veda that heaven is not for him who leaves no male issue. It consequently appears that celestial bliss is attained through a son, and that is made evident by the text of Yajnyawalcya.—"The endless abodes, &c" Since the purport is the same, they are allotted to those who have grandsons: the word son here signifies offspring in general. It is thus declared that sons and other male descendants are desirable. The sage proceeds to show eternity *enjoyed* through the means of a son; childless men become invisible giants or demons. Certainly that is a great evil by which the name of giant or demon is *affixed to manes.* Such is the implied sense according to the Ratnacara: "*Enemies, &c.*" This curse is pronounced by them.

312.

Smriti quoted in the Ratnacara:—A son of any description should be anxiously adopted by one who has no male issue for

"A Brahmin immediately "being born is pronounced "debtor to three obligations, "&c.:" and those quoted in the margin, clearly go to show that the adoption of a son is a positive act, and that the contravention of it is the cause of an offence. The act of adoption being a nitya dharma, *i. e.*, the omission to perform which brings upon a sin, and the widow being half the body of her husband, she is as much bound to adopt a son as her husband was. Common sense also proves that a widow ought to do all that which her husband would have done. That a widow fully represents her husband's estates has been recognised by the modern rulings; *à fortiori,* that she ought to do so in a matter of such extreme spiritual importance is substantiated by the whole genius of the Hindoo law. On the necessity of express permission, Jagannatha and a few other pandits of his school are authorities; but all the authorities of Southern India, where the Dattaka Chandrika, the Kaustabha, the Viramitrodoya,

* Menu, Chap. IX, v. 137, cited at VII.
† The first hemistich has been cited at V, 104.

the sake of the funeral cake, water, and solemnities, and for the celebrity of his name.

2. Fathers desire sons, dreading lest they fall to a region of horror *and reflecting; whosoever among these sons* shall go *as a pilgrim* to Gaya, will convey us from those places of torture. (*Vide* Colebrooke's Dig. of Hindu Law, Vol. II, Bk. V, Chap. IV, Sec. XV, pp. 419-421.)

the Mayukshya, &c., were written, uniformly hold that *absence of prohibition is permission*. In the presence of these authors, of which the Dattaka Chandrika is the paramount in Bengal, Jagannatha cannot be respected, specially when we find that, on many points relating to the law of adoption, he has been rejected, and it has been declared that his opinion cannot be accepted as authority. I do not think that the introduction of the maxim *absence of prohibition is assent*—is either unjust or repugnant to the Hindoo feeling. Whether we regard the desire to have male issue in the purely secular view for providing the perpetuation of a name and the continuation of a family, or whether we connect it with religious considerations, there can be but little doubt that it is a desire very strongly felt by the Hindoos.

Many, from the following texts of Menu, infer that a son is not necessary for a widow:—"Many thousands of Brahmins "having avoided sensuality from their early youth, and having "left no issue in their families, have ascended (nevertheless) to "heaven, and like those abstemious men a virtuous wife ascends "to heaven though she have no child, if after the decease of her "husband she devotes herself to pious austerity." If this text does away with the necessity of a son for a widow, *à fortiori* it does so with regard to a man, especially a Brahmin, so many thousands of whom have ascended to heaven, for a direct precedent, showing that a Brahmin can ascend heaven by austerities, was shown by the above text; and it was left to be inferred that a widow might do so. But no precedent being shown of a widow having ascended the heaven by mere religious austerities, it must be admitted that her chance of ascending the heaven by mere religious austerities is not so certain as that of a man. If, on the authority of that text, we hold that a son is not necessary for a widow, *à fortiori* we ought to hold that a son is not necessary for the same reasons for a man also. The above passage of Menu is nothing but an inducement (প্রবৃত্তি মার্গ) held out to widows to perform religious austerities,

and the hope of salvation is held out to them that they may not go astray in despair.

In the Vyavastha Darpana, Vol. II, page 828, Sec. 483, we find "as for a man so for a woman a son is necessary, for a woman too is excluded from heaven if destitute of a son."

"যথা নরস্য তথা নার্য্যাপি পুত্ত্রাবশ্যকঃ
অপুত্ত্রায়াঃ অপি স্বর্গ বারণাৎ।"

"Let not a woman, &c.," of Vasishtha ought to be construed as dissuasive and not mandatory, for if, in spite of this text of Vasishtha—"অদূর বান্ধবং বন্ধু সন্নিকৃষ্টমেব প্রতিগৃহ্লীয়াৎ" "should take an unremote kinsman or near relation of a kinsman,"—the adoption of a remote kinsman can be held valid, on the ground of the injunction being binding only upon the conscience of the pious Hindoos; why not the violation of the text "Let not a woman, &c.," be construed in the same way? (Vyavastha Darpana, Vol. II, p. 948). When with almost all the translations of the Hindoo authorities, and with the help of a highly educated bar, we find so many conflicting opinions among the Judges touching the question of adoption, and on many other points not necessary to be enumerated here, it is no wonder that the Judges in 1816 should have been unable to distinguish between a vyavastha based on the Dattaka Chandrika and Dattaka Mimansa, and should have arrived at a decision on the authority of the Dattaka Mimansa, which altogether denies the right of a widow to adopt, and that decision should have so much startled the mind of the bar that it did not venture to raise the question whether a widow in Bengal, according to the opinion of Devendra Bhattya, could adopt a son without the permission of her husband. When Justice Hollway himself admits that until after the second hearing he could not see what ought to be the true interpretation of the Dattaka Chandrika, it is no wonder that it did not strike our old Persian-knowing pleaders, most of whom perhaps had not even heard the name of the said work of the author, that according to Devendra Bhattya the giving and receiving of a son must stand within the same scope, or in other words, when, according to the said author, in spite of the text of Vasishtha, "Let not a woman, &c.," a widow can give

her son without the permission of her husband, so by parity of reasoning it must be held that she can also receive a son.

That the maxim of the Hindoo law that *the absence of prohibition is assent,* is consistent with justice and the Hindoo feeling has been indirectly recognised by the Privy Council even with regard to Bengal. In the great *Natore* case (W. R., Vol. XVIII, p. 218, but see p. 225), the Lords of the Privy Council, in criticising the strong evidence adduced against the genuineness of the deed of permission, remark :—"The stronger the duty to adopt a son, "the stronger is the presumption. The Rajah would not like "to die without leaving power to his widow to make the adoption; that he should have postponed it to the eve of his death, "is a circumstance that does not weigh against the probability "of the deed, for he was only of the age of 24 or 25, having a "wife younger than himself. These seem to be the presumptions "which have been relied on against the deed, but the presumption in favor of them is not only strong but irresistible."

In the same case the Calcutta High Court remarked :—"We "now come to the consideration of the inherent probabilities "and improbabilities of this remarkable case. Now, in the first "place, it is beyond question that adoption in the Natore "family is a rule. It was therefore most natural that the Rajah, "desirous of leaving a son to perform the necessary ceremonies, "should think of adoption, and it would also be quite natural "that the Rajah Gobindo Chundra, not twenty-five years old, "having a wife who was still young and to whom he seems to "have been attached, who had borne him a daughter, and who "therefore might at any time bear him a son, should not think "of the course to what had been the leading principles of his "family, until warned that his illness might terminate fatally. "There is no evidence to show that he was ever in bad terms "with his wife, Sivesvari, who was living at Natore with him, and "there is thus no reason arising out of her position and his "own why he should not make the deed of permission in her "favor if circumstance required it" (Spl. No. W. R., p. 106, but see pp. 109-110).

Do not the above passages at any rate clearly go to show that when husband and wife are living in good terms, and the de-

ceased died possessed of property, a strong natural presumption arises in favor of the permission, which ought to outweigh the kind of evidence (strong as it was) given in the case? Almost in every adoption case circumstances similar to the above are found. The extension of this presumption a step further would lead to the introduction of the maxim *absence of prohibition is permission.* Let the cold calculating critics say whatever they like, I for myself cannot help believing that the Judges who decided this case had allowed their minds to be influenced by some consideration akin to the doctrine of the Dattaka Chandrika, "that absence of prohibition is sanction," and by the sense of natural justice that if we allow the system of adoption, we ought to accord an unqualified privilege to the widow to do that which every Hindoo considers both on secular and religious considerations an act of paramount necessity.

Lastly, a question arises whether it would be now expedient to disturb the rule which has been so long conceded to by the Hindoos of Bengal, for the introduction of the rule advocated by me may disturb many titles. As to the first argument, I need only say that our Courts of justice, in spite of long concessions as shown before, have changed their opinions on many points of Hindoo law whenever they appeared to them to be erroneous. As to the second argument, much of the difficulty has been removed by the late changes in the law of limitation. Besides that, those widows only on whom properties of their husbands and that of their fathers, &c., have vested, are competent to adopt; but after the devolution of the property to a third person, a widow cannot exercise the power of adoption so as to deprive the heir on whom the property has already vested—*vide Rup Chand Hindoo Mal* v. *Rakhma Bai* (Bom. H. C. Rep., Vol. VIII, p. 114, A. C. J.)

Under these circumstances, I do not think the introduction of the rule laid down by the Hindoo sages and commentators as to the competency of a widow to adopt without any permission from her husband can disturb any title. For she does not obtain a better position than those who hold permission from their husbands, and like those widows, by exercising the power of adoption, she would only defeat the reversionary rights of those who would have taken the inheritance after her death.

CHAPTER V.

THE EFFECTS OF ADOPTION.

THE person legally adopted ceases to have any claim to the family or estate, or to perform the funeral rites, of his natural father; but for the purposes of marriage, mourning, &c., he is not considered in the light of a stranger. A member of a Hindoo family cannot, as such, inherit the property of one taken out of that family by adoption. The severance of an adopted son from his natural family is so complete that no mutual rights as to succession to property can arise between them (*vide Rayan Krishnamachariyar* v. *Kuppannay Yanger*, Mad. H. C. Rep., Vol. I, p. 180; see also *Narasamal* v. *Balarama Charlu*, Mad. H. C. Rep., Vol. I, p. 420.)

There exists a great difference of opinion as to the share to which an adopted son is entitled in the division of the paternal property with legitimate sons subsequently born. Macnaghten holds that, according to the law of Bengal, an adopted son takes one-third of the property, and this is, no doubt, consistent with the rule laid down by Catyayana. Mr. Sutherland, in the third special rule under Head fifth of his Synopsis, remarks:— "Where subsequent to an adoption legally made a legitimate "son is born to the adopter, the adopted son, at a division of "heritage with such son, receives a quarter share according to "the Dattaka Chandrika."

The opinion attributed to the author of the Dattaka Chandrika by Mr. Sutherland, does not appear to be accurate, inasmuch as, according to the doctrine of the Dattaka Chandrika, an adopted son is entitled to one-fourth of the heritage, if he is not endued with eminent qualities, and to one-third, if he is so

endued (*vide* Dattaka Chandrika, Sec. V, vv. 17 to 20). This fact is noticed in note xxii by Mr. Sutherland.*

Jagannatha also holds that an adopted son shall have a third part of the share appertaining to a son legally begotten (Colebrooke's Dig., Vol. III, pp. 290, 291; see also Vyavastha Darpana, pp. 909 and 910). The author of the Dayakrama Sangraha, one of the paramount authorities of the Bengal school, also holds, that the *dattaka* son is to take one-third in the division with a legitimately begotten son subsequently born. Jimutavahana, on the authority of a text of Devala, also prescribes one-third share to an adopted son under similar circumstances. In the case of *Preyag Singh* v. *Auyudhya Singh* (Macnaghten's Precedents of Hindu Law, Vol. II, pp. 184, 185), the Pandits declared that, according to the principles of the Dattaka Mimansa and the Mitacshara, the property should be divided into four shares, three of which to be given to the son of the body, and the fourth to the adopted son. But in *Ayyayn Muppanar* v. *Niladotchi Ammal* (Mad. H. C. Rep., Vol. I, p. 45), Strange and Frere, JJ., ruled, on the authority of the *Saraswati Vilasa,*

* *Note xxii.—Receives a quarter share* (p. 154). This rule is founded on texts of *Vasishtha* and *Catyayana;* the latter of which however is variously read. 'A third part' is substituted by some, for the more prevalent reading 'a fourth part;' the difference being adjusted with reference to the qualities of the claimants. It is not easy to determine, at least satisfactorily, the exact right conferred on the adopted son by the expression চতুর্থাংশ "chaturthansa" (a fourth part or quarter share). If it be contended, as it perhaps justly may, that by the expression in question, a specific share of the whole estate is assigned to the adopted son, a great inconsistency would result. Where a division of heritage might take place between an adopted son and several legitimate sons subsequently born, the share of the former would in some instances exceed those of the latter. This objection might be obviated by adopting the exposition of Nanda Pandit, who explains the terms referred to as signifying "a quarter share," not an entire share; intimating, probably, thereby that the adopted son, under the circumstances proposed, should receive the fourth of the share, which would be allotted to him, supposing him to be a real legitimate son. Thus if 1,700 rupees or *bighas* were to be distributed between one adopted, and four real legitimate sons subsequently born, the portion of the former would be 85, while each of the latter would take 340; or perhaps the objection stated might be more satisfactorily obviated by construing the expression "a fourth part or quarter share" to signify the fourth of the share received by a legitimate son. Thus in the case supposed the share of the adopted would be 100, and those allotted to each of the legitimate sons 400.

that the fourth share mentioned in the Mitacshara as that of an adopted son where a natural son is subsequently born, is a fourth of what the latter is to have,—that is, the estate must be divided into five portions, of which the begotten son is entitled to four and the adopted son to one. Thus the adopted son would receive only a fifth of the whole estate. A similar decision was passed by the Sudder Adawlut of Bombay (West and Bülher's Digest of Hindu Law, p. 43). Among the *sudras* the adopted son inherits the property left by his adoptive father equally with the legitimate sons subsequently born (Dattaka Chandrika, Sec. V, v. 32).

According to the Dayabhaga, the adopted son can only inherit the estate of his adoptive father; but in the case of *Syam Chunder* and *Rudra Chunder* v. *Narayaini Debya* and *Ramkishore Roy* (Sel. Rep., Vol. I, p. 279, new edition), it was held, that an adopted son succeeds collaterally as well as lineally in the family of his adoptive father. This decision was upheld in the Privy Council (see Suth. P. C. Judgment, Vol. I, p. 25).

This case was decided on the authority of Menu, who, in enumerating the twelve descriptions of sons allowed by the Hindoo law, of whom only two or three including *ourosa* son exist now, places the adopted son among the first six who are the kinsmen and heirs.

Menu.—" The son begotten by aman himself *in lawful wedlock*, " the son of his wife begotten *in the manner before described*, " a son given *to him*, a son made *or adopted*, a son of concealed " birth, *or whose real father cannot be known*, and a son rejected " *by his natural parents*, are the six kinsmen and heirs " (Menu, Chap. IX, sloka 159).

" The son of a young woman *unmarried*, the son of a pregnant " bride, a son bought, a son by a twice married woman, a son " self given, and a son by a *sudra*, are the six kinsmen, but not " heirs to *collaterals* " (Menu, Chap. IX, sloka 160).

Menu and all other sages uniformly declare that, of the twelve descriptions of sons, those who are included under the first six, are kinsmen and heirs; and those who are described among the last six, are kinsmen but not heirs to the collaterals.

Now, let us divide the sages who differ as to the position of an adopted son:—(1) Menu, (2) Gotama, and (3) the author of the

Kalika Purana, place the adopted son among the first six; while (1) Vishnu, (2) Sancha, (3) Lichita, (4) Harita, (5) Narada, (6) Yajnyawalcya, (7) Devala, and (8) Yama place the adopted son among the last six, and thus give him a position which disqualifies him to succeed collaterally. I think the author of the Dayabhaga had allowed himself to be influenced by the opinion of the majority, as well as by the fact that in many cases Menu does not prevail now, as he did in the *golden* age, *Satya Yoog.*

In whatever spirit the *dictum* of the Sudder Dewanny about the collateral succession of adopted sons is received now, it was at one time considered as opposed to the prevalent doctrine of the Hindoo law. In the case of *Syam Chunder* v. *Narayani Debya,* the Privy Council and the Calcutta Sudder revived a law which had lain dormant, perhaps for ages. Notwithstanding the amendment made by the late Sudder Court upon the doctrine of the Dayabhaga to the extent of admitting the right of an adopted son to succeed collaterallyJ, ustice Pandit, in the case of *Mrinamoyi Debya* v. *Bijoy Krishna Goshwame* (Spl. No. W. R., pp. 121-122), expressed doubt as to the question whether "when two "brothers, one an adopted son, and the other the son of the "body of his father, have to inherit as brother's sons or brother's "grandsons, the property of a kindred of their father, they "take this estate in equal or in the same shares in which they "have taken their father's estate." The Madras High Court has also expressed an opinion to the effect that, although it is a settled law that an adopted son succeeds collaterally in the family of his adoptive father, it is not yet decided whether he succeeds as a collateral to a full share or only to the same proportionate share that survives him in the case of after-born sons on the death of the adoptive father—*Chinnaramakristna Ayyar* v. *Minatchi Ammal* (Mad. H. C. Rep., Vol. VII, p. 245).

But now the question is settled by a decision of the Calcutta High Court, in the case of *Tara Mohun Bhattacharje* v. *Krepamoyi Debya* (W. R., Vol. IX, p. 423), in which it was held by the High Court that when an adopted son comes to share with heirs other than the legitimately begotten son, he takes an equal share. Those who contend that in collateral successions the adopted son should take a full share, seem to labour under the mistake

that when an adopted son forfeits all kinds of heritable rights in the natural family, it would be an act of injustice to take away anything from him unless there is clearest authority to curtail his rights; but they seem to forget that adopted sons in 99 cases out of 100 become gainers by joining the family of their adoptive fathers. Among the Hindoos, adopted sons are generally taken from families much inferior in wealth to the adopter; even when such adoptions take place among the members of the same family, in none of them the adopted son receives less than three times the property he leaves behind to be inherited by his brothers. But as superior efficacy is attached to an adopted son selected from among one's own brother's sons or sons of other nearest *sapinda*, an exception in such cases ought to be made in their favor. If we read the original texts of our *Rishis* and their commentaries, it becomes clear that the Hindoo writers intended to give a superior position to an adopted son selected from among the adopter's brother's sons or sons of his nearest *sapinda.*

Notwithstanding the law laid down in the case of *Syam Chunder Chowdhry*, it was all along thought, on the authority of the undisturbed portion of the Dayabhaga, that an adopted son could not succeed from a cognate belonging to a different family, such as maternal grandfather, maternal uncle, &c. In the case of *Mrinamoyi Debya* v. *Bijoy Krishna Goshwame* (W. R., Sp. No., p. 121), the question was whether an adopted son could succeed from his maternal grandfather. The case was decided by a Full Bench consisting of three Judges, including Justice Pandit, whose judgment we quote below *in extenso* :—

"I agree generally with my colleagues. I wish to add the " following, with reference to the point for the determination " of which the case is now taken up by three Judges :"—

" No direct text of Hindu law has been shown distinctly " ruling that an adopted son of a daughter can (after the death " of his adoptive mother) succeed to the estate of the father of " the latter, though by adoption the deceased undoubtedly had " legally become his maternal grandfather."

" No case either in Bengal or Behar within the jurisdiction of " any of the two Courts of this Presidency or of any other Pre-

" sidency ruling the point, has been shown. Really such a claim " was not likely to be found to be so rare, if there was any foun- " dation for it. The very fact of no case being found, shows " that the law on the point, as put down in all the English com- " pilations of Hindoo law (though not affirmed directly by any " decision in a proper case) must have long been considered as " settled, or else we would have found numerous cases in which " the point, now under discussion, would have fairly been raised. " It is asked by those who contend for the rights of the adopted " grandsons by daughters, why should they lose a particular line " of inheritance altogether? The answer is simply this, that in " other respects besides this, such an adopted son is admittedly " in a worse position than a son of the body."

" If for instance, after the adoption of a son, a son of the " body be born to the adopting father, the adopted son obtains " less than he would have got if he also had been a son of the " body, and is not in many other respects treated as the eldest " son of his adopting father."

" The system of adoption is one full of injustice, and while " the adopted himself becomes the cause of disappointment to " others, he himself is not altogether exempt from the possibi- " lity of his rights of inheritance in one direction being cur- " tailed entirely, just as well as in being adopted he might be " a loser of his share of a valuable ancestral estate by his be- " ing given away by his natural father, perhaps a rich man, " for adoption in a family comparatively indigent and poor."

" If this right of an adopted son of a daughter had been " ever recognized in Hindu law, then its rules regarding the " rights of the daughters to succeed their father would have " been worded quite differently from the manner in which in " all books they are expressed. Some allusion to an adopted " son would necessarily have been made just where barrenness " and childless widowhood are described as bars to their " right of inheritance. Allusion would also have been made " where such expressions as 'capable of bearing children' are " used. It is quite obvious that the present wording of the " law on this subject is clearly inconsistent with the right of " an adopted son of a daughter to succeed to the estate of her

"father. Besides, if an adopted son lose a part of his rights "by a son of the body being born to his adopting parents "after his adoption, much more than an elder brother loses by "the subsequent birth to his father of another son of the body, "it is natural to suppose that the same difference which is "observed between two such brothers with regard to the estate "of their father, adoptive and natural respectively, would "reasonably be maintained with regard to their rights of suc-"cession to the estate of the father of their mother. No such "provision is made when the right of succession of daughter's "sons is specified in all text-books and English compilations "of Hindu law."

"Notwithstanding the amendment made by the late Sudder "Court upon the doctrine of the *Dayabhaga* to the extent of "admitting the right of an adopted son to succeed collaterally, "according to the doctrines of Menu (as explained by his best "commentators), in the family of his adopting father, it may "still be an open question whether, when two brothers, one an "adopted son, and the other the son of the body of his father, "have to inherit as brother's sons or brother's grandsons, the "property of a kindred of their father, they take this estate "in equal or in the same shares in which they had taken their "father's estate. It is clear that the last mentioned argument "is not conclusive, if these brothers can in the above cases "succeed in equal shares, and in that case, the omission of such "distinction would be useless in both cases. We do not find "that we can dispose of this question by stating as a general "principle that one may adopt another as his own heir and "give him all his own property, but cannot be allowed through "such an act to disinherit a *third* person from the estate of a "*fourth* individual, because an adopting father may even now "do so, when his adopted son may have a right to claim as a "nearer kinsman the estate of a brother or cousin or uncle of "his adopting father to the prejudice of another kindred, who is "distant by one degree in descent and who might have succeeded "to the same unopposed, if there had not been this adoption."

"The principal grounds upon which we think that the opi-"nion of the English compilers of Hindu law against the right

"of an adopted grandson to succeed to the estate of his mater-"nal grandfather is correct, are the facts of no direct texts "acknowledging such a right being anywhere traced, and the "absence among the reported cases of any suit in which the "question directly arose. For aught we know, the case that "we are now deciding might have arisen from a wrong under-"standing of the effect of the decision of 1859 upon this "point of Hindu law, which, however, it did not attempt to "decide. From that decision it may be argued that if the "maternal relatives of the adopting mother stand in the posi-"tion of those relatives that they would be to the son of the "body of the daughter of their family, and if they have a "right to succeed to the estate of this adopted son just as to "that of a son of the daughter, why should the adopted son "himself be debarred from claiming a similar right of inheri-"tance himself to the estate of these maternal relatives? Such "reciprocal rights are not, however, invariably any part of the "Hindu law system of succession. A man never succeeds his "own daughter; and a husband is not invariably, to all kinds "of his wife's *stridhan* property, her heir exclusively, or "jointly with others, and though to some *stridhan* of a step-"mother a son may be heir, she can never claim any inheri-"tance from such a son of her husband."

This ruling was followed in the case of *Chinna Rama Kristna Ayyar* v. *Minatchi Ammal and others* (Mad. H. C. Rep., Vol. VII, p. 245).

In the case of *Tinkuri Chatterjee* v. *Dinanath Banerjee* (W. R., Vol. III, p. 49), it has been held, that an adopted son can succeed to his adoptive mother's *stridhan*, but he cannot inherit the property left by his maternal grandfather (see vyavastha 632, Vyavastha Darpana, p. 915).

In the text of Menu, Baudhayana, Gotama, and Kalika Purana, the *dattaka* son is declared to be a kinsman as well as an heir, whereas in the text of Yama, Vishnu, Harita, Sancha Lichita, Nareda, and Devala, he is placed among the last six who are not heirs to collaterals. These two conflicting doctrines have been reconciled by Hindoo commentators in the following two ways:—The author of the Dattaka Chandrika holds that the *dattaka* son

is entitled or not entitled to inherit from a *bandhu* as he is endued or not endued with good qualities. Jimutavahana holds also nearly the same opinion. He is of opinion that as a *dattaka* son endued with good qualities is rare in the present age, so he is only entitled to inherit his father (see Colebrooke's Dayabhaga, p. 155). The author of the Vibadbhangarnava has expressed the same opinion; the other reconciliation has been made by Kalluka Bhattya in his commentary on the text of Menu. (See Commentary of Kalluka under slokas 158, 159, 160, Chap. IX of Menu.)

"ঔরসঃ ক্ষেত্রজশ্চৈব দত্তঃ কৃত্রিমএবচ।
গঢ়োৎপন্নোহপবিদ্ধশ্চ দায়াদাবান্ধবাশ্চষট্॥"

ঔরস ইতি। ঔরসাদয়োবক্ষ্যমাণ লক্ষণাঃ ষট্ঋকথভাজো বান্ধবাশ্চভবন্তি॥

(মনুসংহিতা ১৫৯ শ্লোক ৯ অধ্যায়)

"কানীনশ্চ সহোঢ়শ্চ ক্রীতঃ পৌনর্ভবস্তথা।
স্বয়ন্দত্তশ্চ শৌদ্রশ্চ ষড় দায়াদ বান্ধবাঃ॥"

কানীনশ্চেতি। কানীনা দয়োবক্ষ্যমাণ লক্ষনাঃ ষট্ গোত্ররিক্থহরানভবন্তি বান্ধবাস্ত ভবন্তীতি। (মনুসংহিতা ৯ অধ্যায় ১৬০ শ্লোক)

"পুত্রান্ দ্বাদশ যানাহ নৃণাং স্বায়ম্ভুবো মনুঃ।
তেষাং ষড়বন্ধু দায়াদাঃ ষড়দায়াদ বান্ধবাঃ॥"

(মনুসংহিতা ৯ অধ্যায় ১৫৮ শ্লোক)

পুত্রানিতি। যান্ দ্বাদশ পুত্রান্ হৈরণ্যগর্ভো মনুরাহ তেষাং মধ্যাদাদ্যাঃ ষড়বান্ধবাঃ গোত্রদায়াদাশ্চ তস্মাদ্বান্ধবত্বেন সপিণ্ডসমানোদকানাং পিণ্ডোদকদানাদি কুর্ব্বন্ত্যণন্তরাভাবেচ গোত্রদায়ং গৃহ্নন্তি পিতৃরিকৃথভাক্ত স্য পুত্রাঋকৃথহরাঃ পিতুরিতি দ্বাদশবিধ পুত্রানামেব বক্ষ্যমাণত্বাৎ। উত্তরে ষট্ নগোত্র ধনহরাভবন্তি বান্ধবাস্ত ভবন্তি ততশ্চ বন্ধুকার্য্য মুদকং ক্রিয়াদি কুর্ব্বন্তি। মেধাতিথিস্ত ষড়দায়াদবান্ধবাইত্যুত্তরষট্কস্যা দায়াদত্বম বান্ধবত্বঞ্চাহ তন্ন বৌধায়নেন বন্ধুত্বস্যাভিহিতত্বাৎতদাহ। কানীনঞ্চ সহোঢ়ঞ্চ ক্রীতং পৌনর্ভবং তথা। স্বয়ন্দত্তং নিষাদঞ্চ গোত্রভাজঃ প্রচক্ষত ইতি। (মনুসংহিতা ৯ অধ্যায় ১৫৮ শ্লোক)

"Among the twelve sons who are spoken of by Menu, the "son of Brahma, the first six (among which *dattaka* is placed) "are kinsmen and heirs to the relation of the same race "(*gotra*); consequently as kinsmen they offer oblation-cakes, "water, and so forth, to *sapindas* and *somanodokas*, and in "default of the nearer (heir), they succeed to the heritage of "the relations of the same race (*gotra*); for it will be declared "that the twelve descriptions of sons, without any exception, "inherit the estate of their fathers. The last six do not take

"the heritage of their relations of the same race, but become "kinsmen, and as such they perform the duties of kinsmen, "that is, offer the libation of water, and so forth." (Commentary on Menu, Chap. IX, v. 158).

Vijyaneshwara has laid down almost the same doctrine (*vide* Mitacshara, Chap. I, Sec. II, vv. 31, 32).

Baboo Syama Charan Sirkar approves this reconciliation, and holds that a *dattaka* son is entitled to inherit from a relation of the same *gotra*, but not from a cognate or a relation of a different *gotra*.

In the case of *Padma Kumari Debya Chowdrany and another* v. *Jagut Kishore Acharje Chowdhry* (Cal. Law Rep., Vol. IV, p. 538), it was contended on behalf of the respondent, that, on the authority of Kalluka, if it be held that *dattaka* son, and the rest enumerated among the first six, are entitled only to inherit from a cognate of the same family (*gotra*), and not from a cognate sprung from a different family, then the natural-born son, who stands among the first six, would also be debarred from inheriting the wealth of such cognates.

This argument at the first sight does indeed appear very plausible. In speaking of the first six, I do not think Kalluka had the remotest idea of describing the position and the rights of a son born in lawful wedlock, about whose position and rights there was no difference of opinion among the sages.

Besides, when we read Kalluka's commentary under sloka 158 of Menu, Chap. IX, with the light thrown upon it by the slokas of Menu noted in the margin, and their commentary by Kalluka himself, it becomes clear that the highest position is given to the *ourasa* son, and that the position so given by the special canons of Menu and other sages cannot be taken away from him; because he is placed among those six kinds of sons who, according to Kalluka, can only inherit the property of the relations of the same *gotra*. No one since Menu's time denied to an *ourasa* son the superior rights he possesses. Kalluka must be supposed to have possessed this knowledge when he wrote his commentary, and whatever he said there must be construed subject to the rule which gives the first rank to the *ourasa* son. When we consider

161, 163, 164, 165, and 166, Chap. IX.

all these circumstances, it becomes clear that Kalluka Bhattya, by the language used in his commentary, simply wanted to extend the position of *khetraja* and other sons enumerated in 159 Menu, Chap. IX, to the extent of allowing them to succeed to the heritage of the relations of the same race' (*gotra*), and had not the remotest idea of curtailing the superior rights which the whole genius of the Hindoo law gives to a son born in lawful wedlock.

Among the substituted sons, about whom a difference of opinion existed among the sages, *dattaka* is the only one now existing in practice, and so it must be assumed that Kalluka intended to reconcile the difference of opinion regarding him only. We find some sages making him heir to his father as well as to other kinsmen, and some making him heir to his father only. We also find there are two sets of cognates,—one sprung from the same family, and the other from a different family. According to the rules of interpretation of the Hindoo law, one would, independently of Kalluka, come to the conclusion, in order to keep consistency among the sages, that those who declared a *dattaka* incompetent to succeed to his kinsmen, simply meant that he could not succeed to one set of kinsmen; and those who declared him competent to succeed to his kinsmen, meant that he could succeed to that set of kinsmen who do not come within the prohibition of the other sages. Kalluka only took upon himself the responsibility of naming that set of kinsmen (*gotra dayadu*, agnates) who ought not to come within the prohibitions of Vishnu, Narada, &c., and in so making an adoptive son heir to his adoptive father's relatives sprung from the same family, Kalluka is supported to a certain extent by principles of equity. Possibly, Kalluka may have written his gloss, with regard to the heritable rights of an adopted son, as an amendment to the Dayabhaga. Then, as to the argument why he places an *ourosa* son with the other sons, I should observe, however clear the rights of a Hindoo to succeed his maternal relatives may appear now, it was not so clear some fifty years ago, and it must have been still more obscure in Kalluka's time, with whom either Jimutavahana was contemporary, or in whose time the laws of Jimutavahana—which, quite irrespective of the doctrine of consanguinity, attempted to regulate

the course of inheritance solely by the application of the doctrine of spiritual benefit—must have only commenced to spread among the Hindoos of Bengal. So it may be that in Kalluka's time, as in the countries governed by the Mitacshara, the *ourosa* son could only, in default of the *samanodakas*, succeed to the property of his maternal relatives. Kalluka only wanted to extend the heritable rights of the inferior kinds of sons with the admitted and possible rights of the *ourosa* son, which only extended to the extent of inheriting the property of the relatives belonging to the same (*gotra*) race, and did not think it necessary to express any opinion for the purpose of rendering clear the law on a subject which was perhaps widely known in his time; and so what could have been easily understood then has, by subsequent change in the law, become a glaring anomaly. That Kalluka wrote his gloss under section 158, Chap. IX of Menu, imbued with the ideas of men governed by Mitacshara, is strengthened by the fact that the Mitacshara was superseded in Bengal by the Dayabhaga during or before his time, and people possibly could not have wiped off the impressions made on their minds by the working of the Mitacshara and other works of that school for ages upon them. This may be another reason why Kalluka has placed the *ourosa* son in such a position as to exclude him from inheriting the property left by his maternal relatives. Because one part of the law does not coincide with existing law, that cannot be accepted as a ground for rejecting that part of the law which is clear and approved by the Hindoos and their Pandits. Whatever may have been the law on this subject declared by the *Rishis*, who, like watches, only agree in disagreeing with each other, nobody can deny that since the time of Kalluka and Jimutavahana, the law relating to the rights of an adopted son has been understood among the Hindoos of learning in the way in which Baboo Syama Charan has understood it. The law was so understood by the Pandits in *Gungamoya's* case (Sel. Rep., Vol. III, p. 170, new edition) as well as by Macnaghten (Principles of Hindu Law, pp. 85, 86), but the popular opinion seems to have been that an adopted son only succeeded to his adoptive father as laid down by the Dayabhaga, and this fact is borne out by the judgment of the Principal Sudder Ameen of Dacca in 1860, who

held that the Dayabhaga must prevail over Menu, and that an adopted son could not succeed from the collateral relatives of his father sprung from the same race (*gotra*). This judgment was, of course, set aside by the Sudder Court (*vide* S. D. D. for 1860, p. 411).

In the case of *Syam Chander* v. *Narayni Debya*, the question was, whether an adopted son could succeed from a cognate sprung from the same family; and the Privy Council held that, according to the Hindoo law, an adopted son succeeds not only lineally, but also collaterally, to the inheritance of his adoptive father's relations. (Sutherland's P. C. Judgment, Vol. I, p. 25.*) Macnaghten and other writers, who, on the authority of *Gungamoya's* case, hold that an adopted son has no legal claim to the property of a *bandhu* or cognate, for instance, to the property of his adoptive mother's father, seem to have laid down the rule on the authority of that portion of the Dayabhaga which was not disturbed by *Syam Chander's* case. For, according to the Dayabhaga, an adopted son can neither succeed from his father's collateral relatives nor from cognates, or in the phraseology of our Pandits, neither from *sagotra bandhava*, nor from *asogotra bandhava*, cognates sprung from the same or different family. According to Macnaghten, the Privy Council has only upset that portion of the Dayabhaga which would not allow an adopted son to succeed to the property of the relatives sprung from the same family with the adopted son's father; so Macnaghten, on the authority of the undisturbed portion of the Dayabhaga, has laid it down that an adopted son is incompetent to claim the property of cognates, such as maternal grandfather, &c.

The preceding pages will show to the reader the opinion entertained on this subject by our sages and commentators. Now let us proceed to examine the recent tendency of our Courts of Justice. In the case of *Shamkuar and others* v. *Gayadin and another* (Ind. Law Rep., Vol. I, All. Series, p. 255), the High Court for the North-Western Provinces, after reviewing all the

* Before the Privy Council Syam Chander was represented by his son Sambhoo Chander, so instead of Syam Chander, &c., we find in the Privy Council Judgment "*Sambhoo Chander son of Syam Chander and Rudar Chander* v. *Narayni Debya and Ram Kishore.*"—See P. C. Judgment, Vol. I, p. 25.

authorities on the subject, held, that an adopted son, under the Dattaka Mimansa and Mitacshara, succeeds to property to which his adoptive mother succeeds as the heiress of her father.

In the case of *Padmakumari Chowdrany and others* v. *Jagat Kishore Acharjee*, minor, under the Court of Wards, and *Gagan Chundra Chowdhry* (J. G. Shome's Law Rep., Vol. II, p. 228; Cal. Law Rep., Vol. IV, p. 538), the question was, whether an adopted son could succeed to the property left by his adoptive parent's daughter's son, or, in other words, whether an adopted son could succeed his adoptive sister's son (*bhagina*). The Subordinate Judge of Mymensingh, on the authority of *Mrinamoyi* v. *Bijoy Krishto* (W. R., Sp. No., p. 121) and on that of Kalluka, decided that an adopted son could not succeed to his sister's son; and there was a cross-appeal on this and other points decided against the defendant. The respondent contended that, in the presence of Gagan Chundra Chowdhry, who admitted the validity of No. 1 respondent's (Jogat Kishore's) father's adoption, Padmakumari's husband, Joykishore, could not be an heir to the property left by Bhowany, Gogan's adoptive sister's son. Honorable Justice Mitter, on holding that Gogan, though an adopted son, could succeed to the property left by his adoptive sister's son, proceeded to argue the question thus:—"The "lower Court has decided this question in favor of the plaintiffs, "solely on the authority of a gloss on a text of Menu by Kal-"luka Bhattya, the well-known commentator of the Institutes of "Menu. The text of Menu and the gloss in question are to be "found at pages 145, 146 of Colebrooke's Digest, Vol. III, Bk. V, "Chap. IV, Sec. I. Whether this gloss supports the conclu-"sion of the lower Court, is a question to which I shall revert here-"after. But it is beyond all doubt that it would not be a correct "basis of decision, if the position laid down in it be found to be "opposed to the authorities which are generally appealed to and "which govern the decision of questions of adoption arising in the "Bengal school. These are the two well-known works on adoption, "*viz.*, the Dattaka Chandrika by Devendra Bhattya, and the "Dattaka Mimansa by Nanda Pandit Then how does the ques-"tion raised before us stand upon the authority of those two "works of adoption? It appears abundantly clear from both

"these treatises that the position and status of an adopted son "are precisely the same as those of a natural-born son, except "in a few instances which are expressly enumerated. In "Sec, III, para. 1 of the Dattaka Chandrika, the author, after "laying down the special rule, *viz.*, that 'an adopted son cannot "officiate in the sixteen funeral repasts, if the legitimate son "exists,' says: 'And a text of Yajnyawalcya recites, "Amongst "'these the next in order is heir, and present funeral oblations on "'failure of the preceding, *otherwise the adopted son in every* "'*respect, resembles the real legitimate son.*'" The same author "in discussing the question, whether an adopted son succeeds to "empire or not, says in Sec. V, para 28: 'Thus the son of the "'wife, the son given, and the rest, *receive the share prescribed for* "'*them by the general law,*' for grounds for contracting the opera- "tion of the same are wanting," &c. Again in Sec. VI, para. 53 of the Dattaka Mimansa, it is laid down:—The adopted son, as "substitute for the real legitimate son being the agent of rites "performed by a legitimate son, it follows that he is the per- "former of funeral repasts, the objects of which are the *manes*— "in honor of whom a legitimate son performs such repasts. "For, *without difference,* relation to the father and other sires of "the adopter obtains in the *same manner as relation to the* "*general family the Sakha,* the family deity, and family rules "of that person. From these passages it is evident that the "rights of an adopted son, unless curtailed by express texts, are "in every respect similar to those of a natural-born son."

"Have any text been produced to show that an adopted son "cannot succeed to the estate of such relatives of his father as "are sprung from a different family? The learned advocates who "argued this question before us in support of the plaintiffs' "contention, have not been able to refer us to any authority to "establish this proposition."

"On the other hand, both in the Dattaka Chandrika and the "Dattaka Mimansa, there are passages which lead to the opposite "conclusion. The author of the Dattaka Chandrika, after referring "to the contradictory texts of ancient Rishis upon the subject of "the adopted son being heir to his father's kinsmen, in Section V, "para. 22, says:—'By reason of succeeding to the estate of

" '*sapinda* kinsmen, as well as to that of the father, he is (argued " 'by the one to be) heir to kinsmen.' "

"Then after reconciling in the same paragraph these contra-"dictory passages in a way which it is not necessary here to "notice, in para. 24 he lays down the law thus:—'Therefore, " 'by the same relationship of brother, and so forth, in virtue " 'of which the real legitimate son would succeed to the estate " 'of a brother or other kinsmen, when such son may not exist " '(the adopted son), takes the whole estate even.' "

"Now, reading the two passages together, it is clear that the "phrase '*other kinsmen*' italicized above, at least includes the "*sapinda* kinsmen, if not others. Therefore we have next to con-"sider the question whether defendant No. 2, Gogan, is a *sa*-"*pinda* kinsman of Bhowany Kishore or not. The following pass-"ages from the Dattaka Chandrika and the Dattaka Mimansa "will show that, as regards *sapinda* relationship in the family "of the adoptive father, there is no difference between a *dattaka* "and a natural-born son" (para. 32, Sec. 6, Dattaka Mimansa):

" 'Therefore, not being otherwise inferrible, the relation of *sa*-"*pinda* in the peculiar family (kola) of the adopter, as founded "only on express text of law, must be admitted. This is de-"clared: Relation of *sapinda* is of two descriptions—through "consanguinity, and connection by a funeral oblation; of these, "the relation of *sapinda*, arising from consanguinity being ob-"viously barred in the case of the adopted son. Hemadri (after "having declared the relation, as arising alone from connection by "a funeral oblation and consanguinity) has determined the relation "of *sapinda* of sons given, and *the rest in the family of the* "*adoptive father as extending only to the third degree.*' "

"Para. 38.—'But in the instance of the real legitimate son, is " 'not thus the performance of the *sapindikoran* (for his father) " 'with three forefathers only established by holy writ? Being " 'established then by this alone, for what purpose is the incon-" 'venience of introducing another express text to declare it'? Anti-"cipating this objection, the author subjoins—'therefore this of " 'adopted sons, is a relation of *sapinda* extending only to the third " 'degree, being productive of uncleanness and disability of mar-" 'riage, and consisting in connection by funeral oblations, &c., &c.' "

"Para. 39.—Intending merely this, it is said by the author of "the *Sangraha* :—'The relation as *sapinda* of adopted sons "'extends to three degrees in the family of the natural father, "'and like that in the family of the adopter. This is a rule of "'law. The mention here of relation as *sapinda* in both families, "'is with reference to the son of two fathers, for it has been shown "'that the ceremony *sapindikoran* of such son is performed "'with two sets of three forefathers. Of the absolutely adopted "'son, the relation of *sapinda* in the family of the adopter, con- "'sisting in connection by funeral *oblations, extends to three de-* "'*grees* ; in the family of the natural father, arising only from "'consanguinity, it extends to seven degrees; to enlarge would be "'useless' (Dattaka Chandrika, Sec. III, para. 16). In the same "manner by parity of reason, where there may be a diversity of "mothers, the sires of the natural mothers are first designated by "a son who is son to two fathers at the funeral repast (suggest- "ed by the passage subjoined) in honor of the maternal grand- "sires; subsequently the sires of her who is the adoptive mother; "where the paternal sires are honored, there certainly are the "maternal."

"Para. 17.—'But the absolutely adopted son presents oblations "'to the father and the other ancestors of his adoptive mother "'only, for he is capable of performing the funeral rites of that "'mother only, and thus in conformity with the spirit of the sen- "'tence :'—'He is (destined) to continue the line of his ancestors,' "which is subjoined as the reason (in the text of Vasishtha. The "prohibition (therein) 'let not a man give an only son' refers to an "adopted son, other than the *dwyamu shyayana* or son of "both father ; for (where the adopted son is such) no extinction "of lineage ensues, as has already been declared."

"Para. 18.—The relation as *sapinda* is next considered. This "extends to three degress in the family of the natural father, "by reason of consanguinity, and in that of the adopter, through "connection by the funeral cakes."

"Para. 50 of Section VI of Dattaka Mimansa.—The forefathers "of the adoptive mother only, are also the maternal grandsires "of sons given and the rest, for the rule regarding the paternal, is "equally applicable to the maternal grandsires (of adopted sons)."

"Para. 51.—As for what is said by Hemadri, that the precept "enjoining the performance of funeral repast in honor of the "maternal grandfather refers to the natural maternal grand-"father, that is inaccurate, for it is at variance with the passage,—"'of him who has given away his son, the obsequies fail.' Nor "is the capacity of the maternal grandsires as givers wanting, for "by reason of their affording their assent to the gift (as appears "from this passage having convened his kindred, &c.), they also are "parties to the same. Besides, by this passage—'the funeral cake "follows the family and estate,' the family and estate are declared "to be the cause of performing the funeral repast, and the estate "of the maternal grandfather also, like that of the father, lapses "from the son given. His incapacity to perform a funeral repast in honor to his original maternal grandfather is properly "declared.

"Para. 52.—Accordingly Hemadri himself, from not being "'satisfied with that (just stated), has advanced the other "'position. In the same manner, as for the secondary father, a "'funeral repast must be performed in honor of the secondary "'maternal grandfather and the rest.

"It being thus established that the adopted son succeeds to "the *sapinda* kinsmen of his father, and that as regards the "relationship of *sapinda* there is no difference between the "adopted and the natural-born son, the question before us is "reduced to this,—whether Gogan is a *sapinda* kinsmen of "Bhowany Kishore.

"A reference to the genealogical tree will show the three "immediate paternal ancestors of Gogan are the three imme-"diate maternal ancestors of Bhowany Kishore. Bhowany "Kishore, while living, was bound in *Parvana* rites to offer "funeral cakes to those three maternal ancestors. He now being "dead, therefore participates in the funeral offerings that Gogan "on similar occasions makes to the same three ancestors, who "are his adoptive father, grandfather, and great grandfather; "consequently Gogan and Bhowany Kishore are related to one "another as *sapindas* in accordance with the definition of "*sapinda* laid down in the Full Bench decision in *Guru Gobind* "*Shaha Mandal* v. *Anand Lall Ghose Mozumdar* (reported in

" Beng. Law Rep., Vol. V, p. 15). This definition is entirely in " accordance with para. 38, Chap. XI. Sec I, Dayabhaga, and " para. 7, Chap. XI of the Dyatattwa.

" The conclusion at which the lower Court has arrived upon " this point, is therefore wholly opposed to the law as laid down " in the Dattaka Chandrika and the Dattaka Mimansa, which " are generally accepted as works of unquestionable authority " on the subject of adoption.

" It has been contended before us that verse 8 of Chap. X " of the Dayabhaga supports the conclusion of the lower Court, " although it has not expressly referred to it. It is said that the " 'son given' is not included amongst the first six kinds of sons, " who are declared to be heirs of kinsmen in that verse. This " contention is clearly opposed to the ruling of the Judicial " Committee in *Sumbhu Chunder Chowdhry* v. *Naryany Debya* " (Knapp's Rep. Vol. III, p. 55). If we are to adopt the construc- " tion, we must hold that an adopted son cannot succeed collaterally " *at all*, a position opposed to the uniform current of decided " cases upon the subject. It is true that, in some of these cases, " it has been taken for granted that the text in question of the " Dayabhaga bears the construction for which the plaintiffs' " counsel contends. But a careful examination of the immedi- " ately preceding verse, *viz.*, verse 7, will show that that is not " the correct construction of verse 8.

" The author of the Dayabhaga deduces his conclusion in " verse 8 from Devala's text referred to in verse 7. But it is " not correct to say that Devala's text places the 'son given' " within the class of sons who are not heirs of kinsmen. Devala's " text is not before us, and it may be that he, in *reciting* the twelve " descriptions of sons, followed the order given in verse 7, be- " cause we find that the same text which is referred to in the " Dattaka Chandrika and the Dattaka Mimansa and Colebrooke's " Digest recites them in the same order. But the text, after recit- " ing them in that order, classifies them thus, *viz.*:—(1) son begotten " by a man himself,' (2) 'or procreated by another,' (3) 'or received,' " (4) 'or voluntarily given.' After having classified them in this " manner, the text goes on to say,—'Among these the first six are " heirs of kinsmen, &c.'

"It seems to me to be reasonable to hold that the phrase "'first six' here refers to the first six according to the "classification immediately preceding, and not the first six "according to the *recital* of the different descriptions of "sons given in an earlier portion of the text. In a note by "Srikrishna Tarkalankar, the order which the different descrip- "tions of sons occupy according to the aforesaid classification is "given, and it appears from it that the adopted son falls "within the first six. It is evident therefore that, according to "verse 8, the adopted son succeeds lineally as well as collaterally. "This is the construction which, as already remarked, was adopt- "ed by the Judicial Committee in *Sumbhu Chunder's* case.

"Of the European text-writers there is a consensus of opinion "that the adopted son succeeds to the collateral relations of "his adoptive father. They lay down this rule without any "limitation. It is true that in Macnaghten's Hindu Law, "p. 78, it is laid down, on the authority of the decisions of "Sudder Dewany Adalut, in the case of *Gangamya* v. *Kishen* "*Kishore Chowdhury* (Sel. Rep., Vol. III, p. 128), that an "adopted son does not succeed to the relatives of the adoptive "mother; whether that position is right or wrong, it is not necessary "to discuss in this case. Gogan does not lay claim to the property "of any of his maternal relatives, but to the property of "Bhowany Kishore, who is related to him by adoption *ex parte* "*poterna.* But, upon the point whether the adopted son suc- "ceeds to his adoptive father's relatives, Mr. Macnaghten is at "one with all the other European text-writers.

"The same view of the law is taken by Jagannatha in his "Digest. After fully discussing this question at pages 270 to 273 "of Vol. III, he comes to the conclusion that the adopted sons are "heirs to kinsmen as well as to their own adoptive father. It "remains to notice the gloss of Kalluka Bhattya, upon the sole "basis of which the decision of the lower Court upon this point "rests. As I have already remarked, if it really supported the "view of the lower Court, its authority could not preponderate "against that of the Dattaka Chandrika and the Dattaka "Mimansa. But it seems to me that it does not warrant the "conclusion arrived at by the lower Court. The gloss in ques-

"tion, which is to be found in page 146 of Colebrooke's Digest, "Vol. III, is to the following effect: —

"Menu sprung from the self-existent *Brahma* and first of the "fourteen Menus. Among these twelve sons of men whom he "has named, the first six are *pronounced kinsmen* and *heirs* to "collaterals, &c.

"In the original the phrase (গোত্র দায়দ) *gotra dayada* stands "for 'heirs to collaterals.' *Dayada* is equivalent to heirs, and "*gotra* to family name.

"It is said that *gotra dayada* means heirs of the persons bear-"ing the same family name. It may be that this would be the "meaning of the phrase above alluded to, if the letters are strictly "adhered to. But it appears to me from the context that these "words are intended to include all the collateral members of the "family who stand in the relation of *sapinda*, &c., to the adopted "son. But granting that the literal construction should be "adhered to, does the text in question support the conclusion "of the lower Court? It lays down simply that the first six "kinds of sons are heirs to the *kinsmen* sprung from the same "family. It is not necessarily implied thereby that any one "of these six descriptions of sons is not entitled to inherit to "the estate of a kinsman sprung from a different family. If that "were so, the natural born son would also be debarred from "inheriting the wealth of such kinsmen.

"Now, as regards decided cases, it seems to me that the pre-"cise point raised before us is not touched by any one of them. "The cases of *Mrinamoyi* v. *Bijoy Kristo* (W. R., Sp. No., "p. 121) and *Chinnarama Kristna Ayyar* v. *Minatchi Ammal* "(Mad. H. C. Rep., Vol. VII, p. 245), relate to the right "of the adopted son to succeed to the estate of the relatives of "the *adoptive mother*, which is not the question here. In the "other cases cited, the question whether the adopted son "inherits his adoptive father's relatives, *who are sprung from* "*a different family*, did not arise."*

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* Was not *Mrinamoyi's* case decided virtually according to the undisturbed portions of the Dyabhaga, *viz.*, 'an adopted son cannot inherit the property of a cognate sprung from a different family?' If this principle can apply to *Mrinamoyi's* case, does it not equally apply to the case decided by

The Hindoo instinct of Justice Mitter seems to have compelled him to leave undisturbed the rule laid down by the late Justice Pandit in *Mrinamoyi's* case; but the remarks of the Hon'ble Justice Jackson, as quoted below, go to show that an adopted son is in every respect competent, like a son born in lawful wedlock, to inherit from his paternal and maternal relatives; thus the law respected by the Hindoos for centuries, and propounded by two of their most eminent jurists, has been made to succumb to the interpretation put upon it ages after its promulgation. Hon'ble Justice Jackson remarks thus:—"My brother Mac-"donnel and myself entirely concur with Mr. Justice Mitter in "the conclusion stated in his judgment, and we think, with our "learned brother, that, according to the true interpretation of "the Hindoo law prevailing in Bengal, an adopted son takes by "inheritance from the relatives on the maternal side of his "father by adoption, in the same manner as a son begotten "would take." After this judgment was delivered an unauthenticated copy of a judgment of the Calcutta High Court hereafter quoted was shown to me by a person who wanted to institute a suit for the recovery of property which had vested in his adopted son, since deceased, from his maternal grandfather by adoption. There was another suit for this property instituted on the part of the present plaintiff's wife, who then claimed the property under the strength of a *heba* given to her by her mother, who, it was alleged, had absolute dominion over the property under a will executed in her favor by her husband. In the special appeal of this case, Justice Mitter, who was then in the bar, had argued that, in the presence of his client's adopted son, who was heir to his adoptive maternal grandfather, the respondent, who, according to his own showing, was a distant relative, could not succeed. The High Court declined to express any opinion on this point, as the suit was framed quite in another shape. Now the present plaintiff seeks for a determination of the question, whether his adopted son was heir to his

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Justice Mitter? If an adopted son can succeed to the property left by his adoptive sister's son, then I do not see the law which would prevent him to succeed to the estate of his adoptive mother's father. I do not knew what reason can be assigned to distinguish these two cases.

adoptive maternal grandfather, and also, whether he (the plaintiff) can recover the property as heir to his adopted son. I have made this long digression to show how this novel interpretation of the law would give rise to numerous litigations.

The judgment which was shown to me, and for the authenticity of which I do not vouch, was written in the following language :—

PRESENT :

The Honorable L. S. Jackson and the Honorable W. J. Macdonnel.
Dated the 10th April, 1879.
Case No. 1414 of 1878.

Ram Chunder Chowdhery (*appellant*) *v.* Sib Sundori Dabea, widow of Sitanath Chowdhery, deceased (*respondent*).

Baboo *Trailukkho Nath Mitter* for the appellant.

Baboo *Tarack Nath Sen* for the respondent.

The question raised here is, whether the adopted son of a sister succeeds to the estate of the adoptive mother's brother. We have held, that the adopted son succeeds in all respects as the natural born son does, both in the maternal and paternal side. The appeal is dismissed with costs.

I do not for a moment contend, that the passages of the Dattaka Chandrika and the Dattaka Mimansa, cited by Justice Mitter in *Padmakumari's* case, generally place the adopted son almost in equal footing with the son begotten in lawful wedlock, but the question which presents for our consideration is, whether it would not be highly objectionable on any but the strongest grounds to subject the natives of Bengal to a rule different from that enunciated by special canons of Kalluka Bhattya and Jimatavahana. An attempt has been made by Justice Mitter to impute to those two eminent jurists an opinion favorable to the conclusion at which Justice Mitter has arrived in that case relating to the rights of an adopted son. Whatever may be the opinion of Justice Mitter on this subject, when the Dayabhaga and the gloss of Kalluka have been understood by all Hindoos for ages past in the way in which Babu Sayama Charan has understood them, it would be extremely difficult now for Hindoo minds, imbued with ideas and associations inimical towards the adopted sons, to change their interpretations of those rules. In declaring an adopted son competent to

succeed in all respects as the natural born son does, both on the maternal and paternal sides, one must, quite independently of Kalluka, base his argument on the slokas 158 and 159, Chap. IX of Menu, which stand thus :—

পুত্রাণ দ্বাদশ যানাহ নৃণাং, সায়ম্ভুবো মনুঃ
তেষাং ষড় বন্ধু দায়াদাঃ ষড়দায়াদ বান্ধবাঃ ॥
(মনুসংহিতা ৯ অধ্যায় ১৫৮ শ্লোক)

" Of the twelve sons of men whom Menu, sprung from the self-" existent, has named, six are kinsmen heirs ; six not heirs, *except* " *to their own fathers*, but kinsmen." (Chap. IX, sloka 158.)

ঔরসঃ ক্ষেত্রজশ্চৈব দত্তঃ কৃত্রিম এবচ
গুঢ়োৎপন্নোঽপবিদ্ধশ্চ দায়াদা বান্ধবশ্চষট্
(মনু সংহিতা ৯ অধ্যায় ১৫৯ শ্লোক)

" The son begotten by man himself in *lawful wedlock*, the son " of his wife begotten in the *manner before described*, a son " given *to him*, a son made or *adopted*, a son of concealed birth " or *whose real father cannot be known*, and a son rejected *by* " *his natural parents*, are the kinsmen and heirs." (Chap. IX, Menu, p. 209.)

Then sloka 160 enumerates the six kind of sons who are not heirs to collaterals.

And it will be further urged, that laws opposed to Menu cannot have any force, for it has been distinctly asserted by Brihaspati—

" মন্বর্থ বিপরিতা যা সা স্মৃতির্ণ প্রশস্যতে
বেদার্থো পনিবন্ধৃত্বাৎ প্রাধান্যং হিমনো স্মৃতম্ ॥"

When Menu has enumerated the adopted son among the first six, why should he not, in all respects, be entitled to all the rights of a son begotten in marriage.

Now let us proceed to enquire, whether we follow Menu in all respects, and reject the law which is opposed to the canons of Menu. Menu has declared :—

" এক এবৌরসঃ পুত্রঃ পিত্র্যস্যঃ বসুনঃ প্রভুঃ
শেষা ণামা নৃশংস্যার্থ্যং প্রদদ্যাত্তু প্রজীবনঃ "
(অধ্যায় ৯ শ্লোক ১৬৩)

" ষষ্টন্ত ক্ষেত্রজস্যাংশং প্রদদ্যাৎ পৈতৃকাদ্ধনাৎ
ঔরসো বিভজন্দায়ং পিত্র্যং পঞ্চমমেববা "
(অধ্যায় ৯ শ্লোক ১৬৪)

" ঔরস ক্ষেত্রজৌ পুত্রৌ পিতৃরিকৃথস্য ভাগিনৌ
দশা পারেতু ক্রমশো গোত্ররিকৃথাংশ ভাগিনঃ "
(অধ্যায় ৯ ১৬৫ শ্লোক মনু সংহিত)

" The son of his own body is the sole heir to a man's estate. " He is to allow a maintenance to the rest out of kindness " only." (Chap. IX sloka 163.)

" But when the son of the body divides the paternal inheri- " tance, he is to give a sixth or fifth part of it to the son " of the wife begotten by a kinsman." (Sec. IX, sloka 164.)

" The son of the body, and son of the wife, should succeed to " the paternal estate, but the ten other kinds of sons succeed, " in order, to the family duties and to their share of inheritance." (Sec. IX, sloka 165).

Again Menu has declared :—

উপপন্নো গুণৈঃ সর্ব্বৈঃ পুত্রো যস্যতুদত্রিমঃ
সহরেতৈব তদ্রিক্ থং সম্প্রাপ্তোহপ্যন্যগোত্রতঃ

(৯ অধ্যায় ১৪১ শ্লোক)

" Of the man to whom a son has been given *according to a* " *subsequent law*, adorned with every virtue, that son shall take " a *fifth* or *sixth part* of the heritage though brought from a " different family " (Sir Wm. Jones's translation).

Bidyáságar's translation of sloka 141, Chap. IX, stands thus :— " Of the man who has adopted a son, adorned with every virtue, " that son shall take the heritage, though brought from a " different family."

The italicised portions found in Menu's text, in Sir Wm. Jones's translations, are taken from Kalluka's gloss.

Thus, according to Menu, if a man has many kinds of sons, a son of the body, a son of the wife, an adopted son, and the like, then the son born in lawful wedlock shall take the inheritance, and allot to the son of the wife a fifth or sixth part of it, and shall allow maintenance to the adopted and other sons as an act of mere charity. On failure of a son of the body, a son of the wife shall take the whole property, and failing him the adopted son, and so on, the last named succeeding on the default of the preceding; but if the *dattaka* be adorned with every virtue—a criterion which has become altogether obsolete now, he shall take the heritage, though brought from a different family. But we cannot clearly understand whether, by sloka 141, Menu intended to give an adopted son adorned with virtue the right of inheriting the paternal property along with the natural born son, or he intended thereby to say that, even in the absence

of natural-born sons, a boy brought from a different family cannot take the inheritance with the son of the wife unless he is adorned with every virtue; and this interpretation seems to be more reasonable, otherwise, sloka 163, Chap. IX (এক এবৌরস' পুত্র) "the son of his own body," &c., loses its force and meaning; so in whatever way we interpret the above slokas of Menu, the following deduction is drawn from them:—(1) that an adopted son in the presence of a natural born son is only entitled to maintenance; (2) that an adopted son, if he be adorned with every virtue, shall take the property with the son of the body without any difference in the shares; (3) that, in the absence of a natural born son, an adopted son, though brought from a different family, is entitled to the full inheritance, if *endued with* good qualities, otherwise not; (4) that, though brought from a different family, the adopted son is adorned with every virtue, according to Sir Wm. Jones's translation, entitled to only a *fifth* or *sixth* part of the heritage, *vide* Gloss of Kalluka under sloka 141, Chap. IX, Menu.

Now let us consider what Kattyayana says on the subject:—

"উৎপন্নেত্ত্বৌরসে পুত্রে তৃতীয়াংস হরাঃ স্মৃতাঃ
সবর্ণা অসবর্ণাস্তু গ্রাসাচ্ছাদন ভাগিনঃ।"

"On the birth of a son of the body, the other sons of the same "caste with the father, take a third of his heritage; but if they "be of a different caste, they are entitled only to maintenance."

According to Kattyayana, therefore, the son of the wife, the adopted, and other sons of the same caste with the father take *one-third* of the paternal estate, and can claim a mere *maintenance* if they are of different castes. Menu allows a sixth or fifth of the heritage to the son of the wife begotten by kinsman, as shown in Sir Wm. Jones's translation, and mere maintenance to the other kinds of sons; while Kattyayana gives a third part of the estate to the son of the wife, as well as to all the rest who are of the same caste with the father. According to Menu, when there is a son of the body, the adopted son is entitled only to maintenance, or if he is adorned with every virtue, he takes the heritage, though brought from a different family. I have already stated the dubious meaning of the text, which requires an adopted son to be adorned with every virtue before he can take the heritage. Mark now the differences between Kattyayana

and Menu. If we observe the actual practice, we shall find, in this case, the injunction of Menu is entirely disregarded, for we can never see an adopted son either taking mere maintenance or receiving the heritage without any distinction in the share with the son of the body on the ground of superior virtue. But we find Kattyayana, who holds a contrary opinion, followed (*vide* Macnaghten, p. 77):—" Where a legitimate son is born " subsequently to the adoption, the adopted son takes one-third " according to the law of Bengal." The author of the Dattaka Chandrika gives a third share when the adopted son is endued with eminent qualities, otherwise generally on the authority of *Vasishtha*, he gives a fourth share to the adopted son when the paternal property is divided between him and a son subsequently born to his adoptive father (*vide* Dattaka Chandrika, Sec. V, placita xvii to xxi). Had Brihaspati intended that all *Smritis* opposed to Menu are to be rejected even in the *Kali Yoog*, how comes it to pass that Kattyayana's rule is now held valid in practice and approved by the commentators?

We now proceed to cite another instance in which Menu is disregarded. Menu has said:—

" ত্রিংশদ্বর্ষো বহেৎ কন্যাং হৃদ্যাং দ্বাদশ বার্ষিকীং
ত্র্যষ্ট বর্ষোঽষ্ট বর্ষাম্বা ধর্ম্মে সীদতি সত্বরঃ।"

(মনু ৯ অধ্যায় ৯৪ শ্লোক)

" A man aged thirty years, is to marry a girl of twelve; or " a man of twenty-four years, a damsel of eight. A breach of " this rule makes a man sinful." Now let us see what other sages declared on this point: amongst those who differ from Menu, we quote a text of Angira, which, we find, is observed in practice at the present day. Angira says:—

"অষ্টবর্ষা ভবেদ্ গৌরী নববর্ষাতু রোহিণী
দশমে কন্যকা প্রোক্তা অতঊর্দ্ধং রজস্বালা।"
তস্মাৎ সংবৎসরে প্রাপ্তে দশমে কন্যকা বুধৈঃ
প্রদাতব্যা প্রযত্নেন ন দোষঃ কাল দোষতঃ।

(উদ্বাহ তত্ত্বোদ্ধৃত।)

" Damsels of eight, nine, and ten are respectively named *gouri*, " *rohini*, and *kanya*; all girls above ten are called *rajaswala*, " or women in their catamenia. When, therefore, a girl has " reached her tenth year, she is to be immediately disposed of

" in marriage, and such marriage, even though celebrated in an " interdicted nuptial season, will not be held culpable."

It will be seen from the above text that Angira has fixed eighth, ninth, and tenth years as the proper marriageable age of a girl; and he enjoins the marriage of a damsel of ten years even in times when weddings are forbidden. On no account he would allow a girl to remain unmarried in her tenth year; but he assigns with respect to males no fixed period for their marriageable age. Menu fixes either the eighth or twelfth year as the marriageable age of a girl with a man of twenty-four or thirty years; any deviation from this rule is declared by him to be sinful: while Angira directs that the damsel should be married in her eighth, ninth, or tenth year; the last of which is declared to be the furthest limit. If the injunctions of Menu in this respect are to be followed, girls of eight or twelve years would be bestowed upon bridegrooms aged twenty-four and thirty years respectively. Do we now see in the present age the operation of the rule laid down by Menu? The rule of Angira, on the contrary, that the eighth, ninth or twelfth years are the proper wedding periods of a girl, and that there is no limit as to the marriageable age of a man, is almost universally observed. Thus we find, as regards the determination of the marriageable age, the rule of Menu is disregarded, while that of Angira, which is opposed to it, is respected.

Now we cite a third instance in which Menu is disregarded. Menu says :—

যস্যা ম্রিয়েত কন্যায়া বাচা সত্যে কৃতে পতিঃ
তামনেন বিধানেন নিজো বিন্দেত দেবরঃ।

(৯ অধ্যায় ৬৯ শ্লোক)

যথা বিধ্যধি গম্যৈনাং শুক্ল বস্ত্রাং শুচিব্রতাং।
মিথো ভজেতা প্রসবাৎ সকৃৎ সকৃদৃতাবৃতৌ।

(৯ অধ্যায় ৭০ শ্লোক)

" ন দত্ত্বাকস্যাচিৎ কন্যাংপুনর্দ্দদ্যাদ্বিচক্ষনঃ
দত্ত্বা পুনঃ প্রযচ্ছণ হি প্রাপ্নোতি পুরুষানৃতম্ ॥"

(৯ অধ্যায় ৭১ শ্লোক)

" The damsel whose husband dies after troth verbally plighted " before consummation, his brother shall take for the purpose of

"begetting a son on her according to this rule." Having taken "such a girl for the above purpose in due form of law, she being "clad in a white robe and pure in her moral conduct, let him "approach her once in due season and until issue be had."

"Let no sensible man who has once given his daughter to a "suitor, give her again (in the event of his death, before consum- "mation) to another, for he who gives away his daughter whom "he had before given, incurs the guilt of stealing a girl."

But Vasishtha is quite opposed to Menu, and declares :—

অদ্ভির্বাচা চ দত্তায়াং ম্রিয়েতাথো বরো যদি।
নচ মন্ত্রো পণীতা স্যাৎ কুমারী পিতুরেব সা॥
যাবচ্চেদাহৃতা কন্যা মন্ত্রৈর্যদি ন সংস্কৃতা।
অন্যস্মৈ বিধিবদ্দেয়া যথা কন্যা তথৈব সা॥

"The damsel whose suitor happens to die after she had been "given to him by the sprinkling of water, or by troth verbally "plighted, but before the utterance of the nuptial texts, conti- "nues her father's." "If a damsel has been given only by pledge "of words, without the consummation of the marital act by the "utterance of the nuptial texts, she should be bestowed upon "another in due form; her state of celibacy is not destroyed by a "mere verbal plight." (Chap. XVII.)

Observe now whether or not there is a broad contradiction between Menu and Vasishtha. According to Menu, a betrothed damsel is privileged to have sexual intercourse with her late suitor's brother until she begets a son. After that she is to continue a widow for life. With the exception of cohabiting with her suitor's brother, she is directed to lead the life of a widow in every other respect, even before the birth of a son, as can be gathered from the directions given with regard to the use of a white robe, which is only intended for the use of the widows. On turning to custom, however, we find the ordinance of Vasishtha respected, and according to his injunction, after the death of her suitor before consummation, a damsel is bestowed upon another; and she is not obliged, in conformity with the law of Menu, to continue a curious life of a widow, as it appears from slokas 69, 70, and 71 of Chapter IX; at any rate she is not allowed to procreate a son by her suitor's brother. As we find Menu disregarded by the author of the Dayabhaga on the authority of the majority of the Rishis, I

dare say, but for his unexpected resuscitation in *Sham Chander's* case (Sel. Rep., Vol. I, p. 279, new edition; and Suth. P. C. Judgment, Vol I, p. 25), he would have been disregarded down to our time also as regards the heritable rights of an adopted son It is a mistake to suppose that Smritis opposed to Menu are to be disregarded in all ages. Menu himself says :—

অন্যে কৃত যুগে ধর্ম্মাস্ত্রেতায়াং দ্বাপরেঽপরে।
অন্যে কলিযুগে নৃণাং যুগ হ্রাসানুরূপতঃ।

(১ অধ্যায় ৫৮ শ্লোক)

"Human power decreasing according to the *Yoogas*, the *dharmas* of the *Sattya Yoog* are one thing, those of the *Treata* another; the *dharmas* of the *Dwapara* are one thing, those of the *Kali* another." Then we find in the first chapter of Parasara Sanhita that four Rishis were legislators for the four *yoogs* mentioned in our *sastras*.

কৃতেতু মানবা ধর্ম্মাস্ত্রেতায়াং গৌতমাঃ স্মৃতাঃ
দ্বাপরে শাঙ্খ লিখিতাঃ কলৌ পরাশরাঃ স্মৃতাঃ।

"The *dharmas* (duties) enjoined by Menu are assigned to the "*Sattya Yoog* (golden age); those by Gotama to the *Treata*; "those by Sankha and Likhita to the *Dwapara*; and those by "Parasara to *Kali Yoog*."

In practice we find that laws opposed to Menu are everywhere respected and followed in *Kali Yoog*, and Parasara assigned the *dharmas* propounded by Menu to be appropriate only to the *Sattya Yoog*. The superiority of the authority of Menu and the invalidity of Smritis opposed to him, as declared by Brihaspati, must necessarily be considered to allude to the *Sattya Yoog*. Had it not been so, how is it that of the twelve descriptions of sons, only we find two or three allowed now? Now I take the liberty to ask, again, whether it was expedient, after so many centuries, to resuscitate the laws of Menu with regard to the heritable right of adopted sons and disturb the law which was propounded by the best of the commentators on the authority of the majority of Rishis and respected by the Hindoos of our time. Though we find the adopted son mentioned in the text of Menu and other sages, I for myself would agree with the opinion of Justice Hollway that this system of adopting a son is of very

modern origin. We do not find a man receiving an adopted son, as we do now, in the *Mohabharut* or the *Ramayana* period. We frequently meet with *khetraja putra* there. If it be conceded that the system of adoption as it obtains amongst the Hindoos of the present day is of modern origin, then it must be admitted that it would be the height of injustice to regulate that system by laws enunciated thousands of years ago, and disregard the rules which have been enunciated by the modern jurists and respected by the Hindoos of Bengal; *vide Collector of Madura* v. *Mataramalinga Sathupatti* (Suth. P. C. Judgment, Vol. II, p. 135). In *Syam Chander* v. *Narayni Debya,* the adopted son was allowed to take the inheritance by becoming a nearer heir to the last full owner (*vide* Sel. Rep., Vol. I, p. 279, new edition). It is almost settled now that an adopted son would succeed to the property left by his adoptive mother's father; now it remains to be seen whether he would succeed in that family with other grandsons on the daughter's side of the last full owner: for instance, Ram Gobind, a Hindoo, dies leaving two daughters, *Bimala* and *Kamala.* At the time of Ram Gobind's death *Bimala* has a son; but *Kamala* becomes a widow, and holds a power of adoption from her husband: under the circumstances stated above, these questions present before us for our consideration:—

1*st,*—Will *Kamala* (the widow daughter) holding a power of adoption inherit the property left by her father as a daughter likely to have male issue? In the Hindoo law no provision is made to meet her case (*vide* W. R., Sp. No., p. 121).

2*nd,*—As far as the last full owner, Ram Gobind, is concerned, he has no necessity whatever that his widow daughter should adopt a son; he has in the person of *Bimala's* son a person who almost fulfils the offices of a son. Ram Gobind himself, but for the perpetuation of his name, had no spiritual necessity for adopting a son; because *Bimala's* son to all intents and purposes is competent to give as good a *pinda* as can be given by a son begotten by a man himself. Under these circumstances would it be proper to allow *Kamala* to create a superfluous grandson, and an artificial heir of equal degree with the son of *Bimala,* and thereby deprive him of a moiety of his heritage?

3*rd,*—Will the adopted son divide the property in equal

shares with the true grandson, or would he be entitled to that share which an adopted son gets in the division of the paternal property with a son subsequently born? Perhaps in answer to my questions it will be said that they have long since been settled by the judgments in *Syam Chander's* and *Tara Mohun Bhattacharjee's* case, and if there be any injustice in so distributing the property, it has been done by the rules laid down in those cases. In *Syam Chander's* case, the adopted son took the inheritance by becoming a nearer heir. As to *Tara Mohun Bhattacharjee's* case (W. R., Vol. IX, p. 423), I need only say that the decision therein passed has regulated the question as to the extent of the heritable rights of an adopted son in the family of his adoptive father; and the question mooted by us refers to the heritable rights of an adopted son in the family of relatives sprung from a family different from that of the adoptive father. I admit that as to the question in what share an adopted son should take the property both from his cognates and agnates, relatives sprung from the same and different family, we are to be guided by almost the same principle, yet it must be borne in mind that there is an essential difference between inheriting from agnates and inheriting from cognates, especially in the case of a grandson inheriting from his maternal grandfather. And because in the former case injustice has been done by our courts of law, we need not make it a precedent to do injustice in the latter, if there be the slightest room to avoid it. For a daughter's son almost fulfils the offices of a son.

In the case of *Gunga Persad Roy* v. *Brijashwari Chowdhurany* (S. D. R., 30th July, 1859, p. 1091), it was held, that the relatives of the adoptive mother inherit the property of her adopted son just as they would succeed to a natural-born son. This ruling is considered as the foundation-stone for building such extensive rights of an adopted son. Although it has been held in the case of *Tincuri Chatterjee* (W. R., Vol. III, p. 49) that an adopted son succeeds to the *stridhan* of his adoptive mother (see also Sutherland's Dattaka Chandrika Synopsis, p. 219, or page 153 of the edition of 1834; Dayakrama Sangraha, p. 57; Sec. V, Dayabhaga, p. 82; Macnaghten's Hindu Law, Vol. I, pp. 39, 40; Vyavastha Darpana, p. 915, and vyavastha No. 632), yet it

would seem that an adopted son is only regarded as the son of the husband and wife who join in the act of adoption, and that, consequently, the son adopted to one wife is no heir to the co-wife—*Kashishwari Dabea* v. *Grish Chunder Lahury* (Suth. W. R. for 1864, p. 71).

An adopted son cannot be disinherited on the ground of misconduct—*Daee* v. *Mutty Natho* (6th October, 1813, 1 Boor., 75). It was also ruled by the Agra Sudder that insubordination to the widow of the adopting father was not sufficient to exclude the adopted son from inheritance. There are other rulings to this effect; but all of them were passed under the Mitacshara—*Ramsurun Dass* v. *Musst. Pran Kuar* (Agra S. D. Sel. Rep., 1865, p. 293).

A childless Hindoo adopted *A* as his son, and afterwards he adopted *B* as his son; and made a will dividing his property, ancestral as well as acquired, between *A* and *B*. *A* filed a petition, denying the right of his adoptive father to adopt *B*, and protesting against the will; but afterwards he assented to the will; after this the adoptive father made an attempt to deprive him altogether from his property, both ancestral and self-acquired. Under the circumstances it was held, that as the father afterwards endeavoured to deprive *A* of all his rights as well those under the will as by the adoption, the consent did not bind *A*, since it was given on the basis of a family arrangement, from which the adoptive father afterwards departed — *Sada Nanda Mahapatra* v. *Banamali and others* (Marsh., 317); see also *Rangma* v. *Atchma* (Suth. P. C. Judgment, Vol. I, p. 197; see also Bom. H. C. Rep., Vol. XI, p. 199).

I know of no Bengal case in which this point was directly raised and decided. The settlement of the parties themselves in *Gopi Mohun Deb* v. *Rajah Raj Kishen*, and the passages from Macnaghten's Considerations of Hindu Law, quoted in the Vyavastha Darpana, page 922, do indeed go to show that even in Bengal a father cannot deprive the son whom he had adopted of his rights.

"*Gopi Mohun Deb* v. *Rajah Raj Kishen.*—" Rajah Nub Kishen "had five wives, but no male issue, when he took Gopi Mohun "Deb in adoption. Gopi Mohun was a son of Ram Sunder Be-

" wertah, one of the brothers of Rajah Nub Kishen. It is usual, " although not necessary, where a man who adopts has several " wives, to adopt the son *as a child of one of them.* The Rajah " accordingly adopted Gopi Mohun Deb as the son of his eldest " wife, Heera Monee Dossee.

" The Rajah entered into an agreement previous to the adop- " tion, by which he promised, in consideration of Ram Sunder " Bewertah's giving his son Gopi Mohun Deb to be adopted by " him (Rajah Nub Kishen) as the son of his eldest wife Heera " Monee Dossee, that he (the Rajah) would give the whole of his " property to Gopi Mohun Deb, if he did not thereafter beget a " son. In case the Rajah should have a son born to him, it was " stipulated that he and Gopi Mohun should share the property " equally between them, and if more than one son should be born, " that they and Gopi Mohun should be equal participators in the " Rajah's estate. Some years after the adoption, Rajah Nub Kishen " had a son by one of his younger wives. This was Raj Kishen, " who, upon the death of his father, became Rajah Raj Kishen. " Rajah Nub Kishen, some time after the birth of Raj Kishen, " made a will, by which he left his adopted son Gopi Mohun pro- " perty to a considerable amount, although but little in compari- " son with the half of his estate. He made several bequests, " and gave everything, not particularly disposed of, to his son " Raj Kishen.

" Upon the death of Nub Kishen, Gopi Mohun Deb filed a bill " against Raj Kishen, by which he prayed for an account, and claim- " ed a moiety of Nub Kishen's estate. This claim was made as well " upon ground of his having been adopted, as upon that of the " agreement which had been entered into by Nub Kishen.

" Raj Kishen did not, by his answer, either admit or deny the " adoption, nor did he either admit or deny the execution of such " an agreement as had been set forth; but he relied upon the will " which Nub Kishen had made in his favor. Gopi Mohun, upon a " hearing of the cause, was declared to have been duly adopted.

" The agreement which had been entered into by Rajah Nub " Kishen could have been satisfactorily proved, but the parties " were advised to come to a settlement of their dispute. This " they did upon the footing of the agreement, and thereby

"revoked the will of Rajah Nub Kishen as far as it related to "the interests of Rajah Raj Kishen or Gopi Mohun Deb.

"I believe this cause would have been decided by the Court "as it was settled by the parties themselves, that is, according "to the agreement which had been entered into by Rajah Nub "Kishen; but the question is, what would have been done, if "such an agreement had never existed? To this I can only an- "swer that the counsel of Gopi Mohun had not any doubt. From "what had been declared upon the Bench, and from the law as "it was understood at that day, we were quite certain that Rajah "Nub Kishen would not have been suffered by his will to de- "prive the son whom he had adopted of his rights; and Gopi "Mohun Deb, if he had failed in proving the agreement, would, "notwithstanding the will, have been declared entitled to one-third "of the estate." (Macnaghten's Considerations of Hindu Law, pp. 230 and 233.)

The case of *Chitks Roghu Nauth Rajah Diksh* v. *Janoki, Chitks widow of Roghu Nauth Rajah Diksh and others* (Bom. H. C. Rep., Vol. XI, p. 199) may be cited to show how far an adopted son is bound by the contract of his natural father postponing the enjoyment of the rights of such adopted son. In this case the plaintiff, on attaining majority, sued his adoptive mother for the recovery of certain moveable and immoveable property. He joined two persons in possession of a portion of this property as parties to the suit.

The mother answered *inter alia* that, according to the agreement, upon the faith of which she had adopted the plaintiff, he was not entitled to the property during her lifetime. The Subordinate Judge gave a decree to the plaintiff for the immoveable property sued for.

The special appeal was heard by Nanabhai Hari Das and Larpent, JJ.

The questions involved in this case were of such new impression, that I cannot help the temptation of quoting below the whole judgment *in extenso*. The judgment was delivered by Nanabhai Hari Das, J., in the following language:—

"We are of opinion that we must confirm the decree of the "Court below in this case. The Assistant Judge says—'It is

"'clear that the adoption took place under the knowledge of "'the agreement and in pursuance of it; when it was actually "'committed to writing, is not very material. I think, however, "'that it must have been drawn up before the adoption. I find "'then distinctly, as a fact, that the plaintiff *Chitks* was given "'and taken in adoption under the agreement contained in this "'deed, and that his father was a consenting party to the "'agreement, and gave him in adoption under the terms con- "'tained in the deed.' This finding we must accept as final. "The deed referred to, Exhibit No. 15, contains the following "provision:—'By virtue of the adoption, this son will have, "'however, no manner of right over my immoveable and "'moveable property during my life, even when he is of age; "'nor will he be entitled to manage the estates; after my death, "'he is the rightful heir, subject to the following conditions,— "'Till that event, I am to bring him up, to give him food and "'clothing, and to bear the expenses of his education. The provi- "'sion of law or *shastra*, should there be any, that when a son has "'been adopted, the mother cannot have any proprietary right "'over her estate, should not affect this transaction, for the boy "'has been adopted on this stipulation only that he would "'have no right whatever to the estate during my lifetime.' "The Assistant Judge also says,—There is a mutuality in the "agreement. The widow says to the father of the infant, "'if you will agree to these terms on behalf of your son, I will "'adopt him; if not, I will not.' It is thus found that the "father of the boy, gave him in adoption and the lady accepted "him, on the express understanding mentioned in the deed; "and that, if it had not been for such mutual understanding, "the adoption would not have taken place at all. If the "father had said, 'I do not agree to such a condition,' the "lady would have said, 'then I do not want to adopt your son.' "And there is no law which would have compelled her to adopt "him or any other boy. Such being the case, unless very strong "grounds are shown why we should not do so, we must give "effect to the intention of both the contracting parties. Mr. "Nagindas has indeed contended that such a stipulation as the "above is opposed to the fundamental principles of the Hindoo

"law of adoption; but he has not pointed out to us any texts "nor cited any cases to that effect. On the other hand, Mr. "Macpherson has referred us to several cases which, though by "no means determining the question now raised, may yet be "regarded as poiniting, in some degree, to a contrary inference "(see Bom. H. C. Rep., Vol. VI, A. C. J., pp. 229, 230; 7 Idem, "Appdx., pp. 21-22 S. A. 32 of 1871; Macnaghten, Vol. II, "p. 183.) In this state of authorities, it would be difficult for the "Court to hold that such a stipulation could not be made. But "admitting, for the sake of argument, that it could not, how can it "be consistently urged that the boy acquired any rights at all in "the family of the adoptive mother? That stipulation is an "essential part of the contract of adoption in this case. According "to the finding, it was the main consideration moving from the "other side which induced her to adopt. If it is void, the whole "contract is affected by its invalidity. If it is merely voidable, "the plaintiff must either acquiesce in or repudiate his natural "father's act as a whole.

"To allow him to acquiesce in one part of it, and to repudi-"ate another, would be to enable him to perpetrate a fraud "upon his adoptive mother by disappointing the expectations "raised in her by that act, of which he desires to have all the "benefit. As was contended for her, she did not accept him in "adoption except upon the faith of, and subject to, the above "stipulation; and, if the law does not recognize such acceptance, "there was no other on her part, there were not then such "gift and acceptance in this case as are requisite to constitute "a valid adoption, and the boy, consequently, cannot be said to "have acquired any legal status in the family, to which he was "transferred by his natural father. In either view of the "matter, therefore, this suit must fail.

"It has also been contended that the father, as guardian, "could not enter into any stipulation unfavorable to the minor. "It does not, however, appear in this case that the contract of "adoption, of which the stipulation in question was an essential "part, was on the whole, unfavorable to the minor. Indeed, it "would rather appear that the contrary was the case. The "Assistant Judge, says:—'In nine cases out of ten, the father

"'acting for his son's benefit would agree to the terms.' The "boy has thereby acquired in the adoptive family considerable "right, both present and future, which, except for that stipula- "tion, his father would not have been able to secure to him. "Besides, it is a fallacy to suppose that for the purpose of giving "in adoption the power of a father is only co-extensive with "the power of a guardian. In the eye of Hindu law, when a "man gives his son in adoption, he would seem to exercise a "power, more like the power of an absolute proprietor than "that of a guardian. Thus a millionaire may, by such gift, "even though all his property be ancestral, transfer one of his "sons to a family possessed of no property whatever; and the "adoption once duly made so completely changes the boy's "status, that ever after he is regarded as the son of the pauper "to whom he was given by his natural father without the least "possibility of his getting back into his natural family." (See *Ravi Bhadra* v. *Rup Sankur*, Borr., Vol. II, 650.)

"We think the rights acquired by the plaintiff in consequence "of his adoption, are subject to the rights created in his adop- "tive mother's favor by the stipulation, to which in a great "measure that adoption itself was due, and must, therefore, "confirm the decree of the lower Court with costs."

Now we come to consider how far a widow can defeat the rights, whether mediate or immediate, of persons who would have been the nearer heir to the last full owner but for such adoption, and would have taken the property immediately but for the intervention of such widow.

The facts of the case of *Bhoobun Moyee Dabea* v. *Ram-kishore Aucharjee* (Suth. P. C. Judgment, Vol. I, p. 574), were, for the purpose of our question, as follows:—Gourkishore Aucharjee, being the owner of considerable zemindary in the district of Mymensingh, died in the year 1821. He left surviving him a widow, named Chundrabali Dabea, and a son named Bhowaneekishore Aucharjee, who, at the time of his father's death, was about four years of age. In 1819, two years after the birth of Bhowanee, Gourkishore executed an instrument, which was in these words:—

"To the abode of all goodness Chundrabali Dabea.

"This is an *anumuttipatra* (deed of permission) to the follow-
"ing purport:—'Prior to the birth of the male child from your
"'womb, I had executed in your favor an *anumuttipatra* on the
"'subject of your receiving (an) adopted son. *Subsequently*, by
"'the will of God, you have given birth to a male child, still,
"'having regard to the future, I have again given you permis-
"'sion. If, which God forbid, the male child of your body be
"'non-existent, then you will adopt a son from my race (*gotra*),
"'or from a different race (*gotra*) for the purpose of performing
"'mine and your *sradha* and other rites, and for the *sheba*
"'(service) of the Gods, and for the succession to the zemindary
"'and other property, on which, if the adopted son be non-
"'existent, which God forbid, then you shall, according to your
"'pleasure, on the failure of one, adopt other sons in succession,
"'to avoid the extinction of the *pinda* (funeral cake or offering);
"'that *dattaka* (adopted son) shall be entitled to perform your
"'and my *sradha*, &c., and that of our ancestors, and also to
"'succeed to the property. To this end I execute this *anum-*
"'*uttipatra*, dated 25th Kartik, 1226, B. S.'"

Bhowaneekishore attained his majority, and married the appellant Bhoobun Moyee Dabea. He died in the month of August, 1840.

Immediately upon the death of Bhowanee, an instrument was set up by Bhoobun Moyee Dabea and Chundrabali Dabea, according to which Bhoobun Moyee was authorized to adopt five sons in succession, and she and her mother-in-law Chundrabali were appointed guardians to look after the persons and the property of such sons. Under this alleged will, the two ladies took possession of the zemindaries of Bhowneekishore, and remained in enjoyment of them for nearly four years. In December 1843, Bhoobun Moyee adopted a boy called Rajendrokishore. Upon this a quarrel appears to have arisen between Chundrabali and Bhoobun Moyee, and Chundrabali, under the strength of the *anumuttipatra* given by her husband, adopted Ramkishore. In 1852, Ramkishore instituted a suit in the Zillah of Mymensingh for the recovery of the property which once belonged to Gourkishore, and made Bhoobun Moyee, Rajendrokishore and Chundrabali Dabea defendants. When the case came on before

the Principal Sudder Ameen, he was of opinion that the plaintiff must recover upon the strength of his own title, and that, if such title failed, it was unnecessary to decide upon the case of the defendant. He was of opinion that the plaintiff has failed to prove his title, and he, therefore, dismissed the suit, expressing, at the same time, a strong opinion in favor of the will set up by Bhoobun Moyee.

The Calcutta Sudder Court on appeal held, that the will of Bhowanee was forgery; that the instrument executed by Gourkishore was true, and was in the nature of a will; and that, under it, Ramkishore was entitled to recover all the property left by Gourkishore. The self-acquired property of Bhowanee was given to Bhoobun Moyee for her life.

The Privy Council expressed an opinion that the will of Bhowanee was a forgery, and after having summarilly disposed of that question, proceeded with the question as to the validity of Ramkishore's adoption:—"The next question is, as to the " validity of the adoption of Ramkishore. We see no reason to " dissent from the opinion of the Court below upon the facts of " the case, *viz.*, that the *anumuttipatra* of Gour is a genuine " instrument; and that, supposing the power given by it to have " been in force when the adoption under it took place, the adop- " tion was good: but we think it unnecessary to examine into " the genuineness of this instrument, as we are of opinion that, " at the time, when Chundrabali professed to exercise it, the " power was incapable of execution.

" The first question which arises, is 'as to the construction of " the instrument.' It seems to have been considered by the two " Judges of the Sudder Court, who decided in favor of the res- " pondent (certainly by one of them), that the document was " to be regarded as a will, and as containing a limitation, on " failure of male issue of the testator in the lifetime of Chundra- " bali, of the estate of the testator to a son to be adopted by " Chundrabali as a *persona designata*, and one of the Judges, " in a very elaborate argument, refers to Mr. Fearne's celebrated " treatise on contingent remainders in order to show that such a " devise by the English law would be valid. There is no doubt " that, by the decision of the Courts of Justice, the testamentary

"power of disposition by Hindoos has been established within "the Presidency of Bengal, but it would be to apply a very "false and mischievous principle if it were held that the nature "and extent of such power can be governed by any analogy to "the law of England. Our system is one of the most artificial "character, founded in a great degree on feudal rules, regulated "by Acts of Parliament, and adjusted by a long course of judi-"cial determinations to the wants of a state of a society differing, "as far as possible, from that which prevails amongst Hindus "in India.

"But their Lordships are quite satisfied that there is, in this case, "no room for the application of any such doctrines. The instru-"ment before us is merely what it purports to be, a deed of permis-"sion to adopt: it is not of testamentary character; it was register-"ed as a deed in the lifetime of the maker; it contains no words "of devise; nor was it the intention of the maker that it should "contain any disposition of his estate, except so far as such "disposition might result from the adoption of a son under it. "He mentions the objects which induced him to make the deed,— "religious motives, the perpetuation of his family, and the suc-"cession to his property; but it was by the adoption, and only "by the adoption, that those objects were to be secured, and "only to the extent in which the adoption could secure them.

"The main ground of the decision in the Court below appears, "therefore, to fail, and this instrument must be construed, and "its effect must be determined, in just the same way as if it "had been made in one of the Provinces of India in which the "power of testamentary disposition is not recognized.

"How, then, is the deed to be construed, when we regard it "merely as a deed of permission to adopt? What is the inten-"tion to be collected from it, and how far will the law permit "such intention to be effected? It must be admitted that it con-"templates the possibility of more than one adoption; that it "shows a strong desire on the part of the maker for the conti-"nuance of a person to perform his funeral rites, and to succeed "to his property; and that it does not, in express terms, assign any "limits to the period within which the adoption may be made. "But it is plain that some limits must be assigned. It might

"well have been that Bhowanee had left a son natural born or "adopted; and that such son had died himself leaving a son; and "that such son had attained his majority in the lifetime of "Chundrabali. It could hardly have been intended that, after "the lapse of several successive heirs, a son should be adopted "to the great-grandfather of the last taker, when all the spiri- "tual purposes of a son, according to the largest construction of "them, would have been satisfied.

"But whatever may have been the intention, would the law "allow it to be effected? We rather understand the Judges "below to have been of opinion that, if Bhowanee had left a "son, or if a son had been lawfully adopted to him by his wife "under a power legally conferred upon her, the power of adop- "tion given to Chundrabali would have been at an end.

"But it is difficult to see what reasons could be assigned for "such a result which would not equally apply to the case "before us.

"In this case, Bhowanee had lived to an age which enabled "him to perform, and it is to be presumed that he had perform- "ed, all the religious services which a son could perform for a "father. He has succeeded to the ancestral property as heir; "he had full power of disposition over it; he might have alien- "ated it; he might have adopted a son to succeed to it, if he had "no male issue of his body; he could have defeated every "intention which his father entertained with respect to the "property.

"On the death of Bhowanee, his wife succeeded as heir to "him, and would have equally succeeded in that character in ex- "clusion of his brothers, if he had any; she took a vested estate as "his widow in the whole of his property. It would be singular "if a brother of Bhowanee, made such by adoption, could take "from his widow the whole of his property when a natural born "brother could have taken no part. If Ramkishore is to take "any of the ancestral property, he must take all he takes by "substitution for the natural born son, and not jointly with "him.

"Whether under his testamentary power of disposition, "Gourkishore could have restricted the interest of Bhowanee

"in his estate to a life interest, or could have limited it over (if "his son left no issue male or such issue male failed) to an adop- "ted son of his own, it is not necessary to consider; it is suffi- "cient to say that he has neither done nor attempted to do this. "The question is, whether the estate of his son being unlimited, "and that son having married and left a widow, his heir, and "that heir having acquired a vested estate in her husband's "property as widow, a new heir can be substituted by adoption "who is to defeat that estate, and take as an adopted son what "a legitimate son of Gourkishore would not have taken.

"This seems contrary to all reasons and to all the principles of "Hindu law, as far as we can collect them.

"It must be recollected that the adopted son, as such, takes "by inheritance and not by devise. Now the rule of Hindu law "is that, in the case of inheritance, the person to succeed must "be the heir of the last full owner. In this case, Bhowanee was "the last full owner, and his wife succeeds as his heir to a "widow's estate. On her death, the person to succeed will again "be the heir at that time of Bhowanee.

"If Bhowanee had died unmarried, his mother Chundrabali "would have been his heir, and the question of adoption would "have stood on quite different grounds. By exercising the "power of adoption, she would have divested no estate but "her own, and this would have brought the case within the "ordinary rule; but no case has been produced, no decision "has been cited from the text books, and no principle has been "stated to show that, by the mere gift of a power of adoption "to a widow, the estate of the heir of a deceased son vested in "possession can be defeated and divested.

"The only case referred to in the argument before us, or in "the judgment below, as tending in that direction, is that of "*Lukhi Narain Thakur*, reported by Sir F. Macnaghten, p. "168; but it is incontestible that, in that case, the disposition "depended wholly on the testamentary power. The authority "to adopt was only subsidiary to the disposition of the property. "The will of Lukhi Narain Thakur is set forth in full in No. 5, "p. 9 of the Appendix to Sir F. Macnaghten's works. It is "termed a will: it appoints an executor: it disposes of the whole

"estate; gives various legacies; gives the residue to the child of "which his youngest wife was pregnant, whether a son or a "daughter, in which latter case it would obviously break the "legal order of succession, and directs that, at that child's death, "the adoption of a son shall take place. We have already said "that we express no opinion as to the power of Gourkishore "to have made the disposition now insisted on by the appellant "by devise of his estates, but we find no such devise in the "instrument which he has executed.

"An additional difficulty in holding the estate of the widow "of Bhowanee to be divested may, perhaps, be found in the "doctrine of Hindu law, that the husband and wife are one; and "that as long as the wife survives, one-half of the husband "survives, but it is not necessary to press this objection.

"Upon the whole, we must humbly report to Her Majesty our "opinion on the original appeal that the plaintiff's suit ought "to be dismissed, but inasmuch as the main expense of it has "been occasioned by the appellant setting up a state of facts "which has turned out to be untrue, and disputing the facts "alleged by the respondents which have been established, we "think that no costs should be awarded to either party of "the suit or of the original appeal. The cross-appeal is wholly "groundless, and we must advise that it be dismissed with "costs.

"The several orders and decrees complained of, so far as "they are inconsistent with above recommendations, must be "reversed."—(Suth. P. C. Judgment, Vol. I, p. 574).

After the decision of this case, the case of *Baikunto Mani Roy* v. *Kristo Soonder Roy* (W. R., Vol. VII, p. 392) was decided by the Calcutta High Court, in pursuance of the principle laid down by an hypothetical case stated at the conclusion of the judgment quoted above. The facts in *Baikunto Mani's* case were as follows:—"A Hindu, with his father's consent, gave his wife per- "mission to adopt a son in the event of the death of his natural "son; that natural son lived to succeed to the ancestral estate "and died, leaving a widow, who held possession till her death, "and then the property reverted to her husband's mother as his "next legal heir; she thereupon took advantage of the per-

"mission given her by her husband, and adopted a son, who succeeded to the ancestral property. It was contended in special "appeal that he was not entitled to succeed as son to her husband, "for that husband had died before his father; nor could he succeed "as the brother and legal heir of his natural son, as his adoption "did not take place after that natural son's death, moreover at "the time of the adoption, the adoptive mother held possession "of the property, not as the widow of her husband, but as the heir "of her natural son. In support of this view of the law pleader "for the special appellant cited the celebrated case of *Bhoobun "Moyee Dabea* v. *Ram Kishore Aucharjee*." (W. R., Vol. III, P. C., 15; and Suth. P. C. Judgment, Vol. I, p. 574). A Division Bench of the Calcutta High Court, consisting of the Hon'ble G. Lock and A. G. Macpherson, Judges, expressed their opinion thus:—

"This case is not quite the same as the present, but the con- "clusion come to in the latter part of the judgment of the "Privy Council, is applicable to the case before us. In the case "we have quoted, Gourkishore died, leaving a widow Chundra- "bali and a son Bhowanee, who married Bhoobun Moyee, and "died leaving no children. Chundrabali had a power of adop- "tion from her husband. Bhoobun Moyee also claimed a similar "authority from her husband and adopted Rajendrokishore. "Chundrabali adopted Ramkishore. The Sudder Court held "that the power to adopt set forth by Bhoobun Moyee was a "forgery, and set aside her adoption; that the power given to "Chundrabali was genuine; and that the adoption of Ram- "kishore was valid, and he was entitled to the estate. The "Privy Council held that, though the adoption by Chundra- "bali was good, her adopted son could not divest the widow of "Bhowanee, the late full owner of the estate. 'But' their Lord- "ships remarked, 'if Bhowanee had died unmarried, his mother "'Chundrabali would have been his heir, and the question of "'adoption would have stood upon quite different grounds. By "'exercising the power of adoption she would have divested no "'estate but her own, and this would have brought the case "'within the ordinary rule.'

"In the case supposed by the Privy Council, their Lordships

"carefully point out that, in the event of Bhowanee dying un-"married, Chundrabali would have succeeded as his *heir;* and "that, if she had adopted, such adoption would have brought "the case under the ordinary rule. What, then, would have "been the position of Chundrabali's adopted son? He would "have been the son of her husband Gourkishore, and would "succeed as brother of Bhowanee to the ancestral property, if "he succeeded at all. The inference to be drawn from what is "said by the Privy Council is that, in the event of Chundra-"bali succeeding as heir to her own son, and exercising the "power of adoption, the son so adopted would obtain the rights "of a natural born son.

"Now, in the case before us, Sarva Mangala was, when she made "the adoption, in the very position in which Chundrabali might "have been, *viz.*, she was in possession of her son Hur "Sunder's property as his heir; and by making the adoption, she "divested only her own estate. It is immaterial that Brija "Sunder, the father of Hur Sunder, died before his father "Ramkishore, for Sarva Mangala held not as his heir but as heir "of her son, and her adoption of the defendant placed him in the "position of a mother to Hur Sunder, and as such entitled "him, after Sarva Mangala, to succeed to Hur Sunder's "estate."

Then comes the case of *Ram Sunder Singh* v. *Survanee Dassee* (W. R., Vol. XXII, p. 121):—"The facts of the case were briefly "as follows:—'One Govindo Churn Singh executed, some times "'before his death, an *anumattipatra* to his wife Survanee "'Dassee, defendant No. 1, giving her permission to adopt five "'sons in succession. Shortly after the death of Govindo Churn "'Singh, Survanee adopted a boy of the name of Kristo Churn "'Singh, who died ten or twelve years after his adoption; that, "'some time after the death of the aforesaid adopted son Kristo "'Churn Singh, Survanee adopted defendant No. 2, who was "'still a minor. Plaintiff questioned the validity of the second "'adoption.' It was contended that the first adopted son lived "to an age sufficiently mature to perform all the spiritual acts "to secure which the *anumattipatra* was executed, and it should "be presumed in this case that the adopted son performed all

"those acts; that after those acts have been performed the power "given to the widow (Survanee Dassee) ceased to have any "operative force. In support of this contention the learned "Counsel for the appellant cited the case of *Bhoobun Moyee* "*Dabea* v. *Ramkishore Aucharjee*." (Moore's Ind. App., Vol. X, p. 279; W. R., Vol. III, P. C. R., 15.)

Justice Mitter, after stating the above facts of the case and the argument of the learned Counsel that the *anumattipatra* given to Survanee ceased to have any operative force at the time of the second adoption, proceeds thus :—"In order to determine "whether this contention is borne out by the authority quoted, "I propose to examine in detail the leading facts and the grounds "upon which the decision in that case rests." Justice Mitter, after having stated the facts of the case and the finding of the Sudder Court—which was to the effect "(1) that the *anumattipatra*, "executed by Gourkishore, father of Bhowanee, was in the "nature of a testamentary devise; (2) that its legal effect was "that it devised the property to his son Bhowaneekishore and "his heirs in general, subject to a power of appointment by the "widow to be exercised in the event of his son Bhowaneekishore "dying without leaving a son, either natural or adopted, or to be "adopted, him surviving; (3) that, by the exercise of the power of "appointment thus given to Chundrabali, Bhoobun Moyee, the heir-"at-law of Bhowanee, was divested of her right in the property; "and (4) that Bhowaneekishore died without executing any deed "of permission *anumattipatra* as alleged by Bhoobun Moyee"—goes on as follows:—"The Privy Council on appeal by Bhoobun "Moyee, concurring in this last finding of the Sudder Court, pro-"ceeded to adjudicate upon the rest of the case thus :—'The next "'question is, they say, as to the validity of the adoption of "'Ramkishore. We see no reason to dissent from the opinion of "'the Court below upon the facts of the case, *viz.*, that the "'*anumattipatra* of Gourkishore is a genuine instrument, and "'that, supposing the powers given by it to have been in force "'when the adoption under it took place, the adoption was good, "'but we think it unnecessary to examine into the genuineness "'of this instrument, as we are of opinion that at the time "'when Chundrabali professed to exercise it, the power was

"'incapable of execution.'" The rest of the decision deals with the reasons upon which they came to this conclusion:—

"But before I proceed to examine those reasons, I may observe "that I do not think that, by the passage last quoted, the Privy "Council intended to lay down that the power (of Chundrabali) "was 'incapable of execution' for all purposes,—*i. e.*, they did not "intend to hold that the adoption of Ramkishore under that "power was wholly invalid. That this was not their meaning "will appear clear, as I proceed further with the examination of "the grounds upon which their conclusion is based.

"In dealing with these reasons they say, 'the first question "which arises is, as to the construction of this instrument,' "and upon this part of the case they, differing from the Sudder "Court, hold that it is not of a testamentary character, but a "simple deed of permission to adopt. And they conclude by "saying that 'he (*i. e.*, Gourkishore) mentions the objects "'which induced him to make the deed—religious motives, the "'protection of his family, and the succession of his property; "'but it was by the adoption,' and only by the adoption, that "these objects were to be secured, and only to the extent in "which the adoption could secure them.

"Having put this legal construction upon the deed, the Privy "Council in the next place deal with the intention of its execu- "tant, to be collected from it, and they say that, 'it must be "'admitted that it contemplates the possibility of more than one "'adoption; that it shows a strong desire on the part of the "'maker for the continuance of a person to perform his funeral "'rites and to succeed to his property; and that it does not in "'express terms assign any limits to the period within which "'the adoption may be made.'

"But they hold that some limits must be assigned to it, and "then they proceed to determine that limit by taking the "particular facts of that case into their consideration. But it "must be borne in mind that the limit which they fixed, was "with reference to the exercise of the power by which both the "ends mentioned by them, *viz.*, performance of funeral rites and "succession to property, might be attained. But that they did "not intend to hold that the limit assigned by them, was the

"limit within which the power must be exercised for the attain-
"ment of either of these ends, is evident from the manner in
"which they put the question, upon the determination of which
"the whole case turns, in p. 311, Vol. IX, Moore's Ind. Appeal,
"3 W. R., P. C. R., pp. 15, 18, the question is, 'whether the
"'estate of his (Gourkishore's) son being unlimited, and that son
"'having married and left a widow his heir; and that heir having
"'acquired a vested estate in her husband's property as widow,
"'a new heir can be substituted by adoption who is to defeat
"'that estate and take as an adopted son what a legitimate son
"'of Gourkishore would not have taken?' This passage leaves
"no doubt in my mind that the Privy Council, when they said,
"'that the power was incapable of execution,' did not intend to
"hold that the power was incapable of execution for all purposes,
"but only for the purpose of divesting the widow of Bhowanee-
"kishore of her proprietary right in the property left by her
"husband.

"In this view of the case quoted, I do not think that it is
"an authority in support of the proposition of law advanced
"by the learned Counsel for the special appellant. Because, in
"order to give effect to his contention in this case, we must go
"the whole length of saying, that the adoption of defendant No. 2
"is absolutely bad and invalid, but the Privy Council decision
"quoted, does not, as I have shown above, warrant us in saying
"this. On the other hand, the concluding observations of their
"Lordships in that case, contained in the following passage,
"lend considerable support to the contention of the respondent:—
"'If Bhowaneekishore,' they say, 'had died unmarried, his
"'mother Chundrabali Dabea would have been his heir, and
"'the question of adoption, would have stood on quite different
"'grounds. By exercising the power of adoption, she would
"'have divested no estate, but her own, and this would have
"'brought the case within the ordinary rule.'

"It is quite evident, that the inclination of their opinion,
"regarding this hypothetical case, was quite in favor of the
"validity of the adoption, and the facts of that hypothetical case
"are exactly the facts found by the Court below in the present
"case.

"Putting, therefore, the case of *Bhoobun Moyee* v. *Ramki-* "*shore Aucharjee* on one side, is there any thing in the general "Hindu law in support of the contention put forward by the "special appellant? No passage from any of the treatises of "the Hindu law, and no texts of the Hindu *shasters*, have been "cited. As far as I am aware, there is none in its support. On "the other hand, the broad proposition for which the learned "Counsel contends, will, in great many cases, defeat the essential "object for which every Hindu desires to adopt, *viz.*, the conti- "nuance of the spiritual benefit to be conferred upon him after "his death. An adopted son, attaining an age of sufficient "maturity, and by performing the religious services enjoined by "the *shasters*, cannot exhaust the whole of the spiritual benefit, "which a son is capable of conferring upon the soul of his "deceased father. Because these services are enjoined to be "repeated at certain stated intervals, and the performance of "them on each successive occasion secures fresh spiritual benefit "to the soul of the deceased father (see note to verse 74 of "Sec. 4, Sutherland's Dattaka Mimansa, where these rights "are fully described), I am, therefore, of opinion, that the "contention of the special appellant is opposed to the general "principles of the Hindoo law."

In the case of *Rajah Vellanki Venkata Krishna Roy* v. *Venkata Rama Lakshmi Narsayya and others* (Ind. App., Vol. IV, p. 1) it was held, that when a widow, on the death of her son, succeeds to the property, which had devolved upon him from his father, she can adopt a son so as to defeat the rights of persons who would have, after the death of the widow, taken the property but for such adoption; and it was further remarked, that in such a case the adoption, being in derogation of the adoptive mother's estate, although she had taken the same in succession to her son and not to her husband, was valid.

In the case of *Rupchand Hindu Mal* v. *Rakhma Bai* (Bom. H. C. Rep., Vol. VIII, A. C. J., p. 114), it was held, that "although "as a general rule the adoption by a Hindu widow of a son to her "deceased husband is in the Maratha country good without the "consent of her husband's kinsmen, when the estate of her hus-

"band is vested in her or in her and her co-widow jointly, yet "when such adoption has the effect of divesting an estate already "vested in a third person,—*i. e.*, the widow of her husband's "deceased brother,—the consent of such third person would "appear to be necessary to give validity to such an adoption."

From these rulings Mr. Mayne seems to have drawn the following deduction: (1) that when property belonging to a relative devolves upon a widow, and she then exercises the power of adoption, the son adopted, under the circumstances, is a valid adopted son, because the widow exercises the power of adoption in derogation of her own right; but that, when the property vests on another person, he cannot be divested of it by the creation of a nearer heir by adoption.*

* P. C. J., Vol. I, p. 575; Ind. App., Vol. IV p. 1, Bom. H. C. Rep., Vol. VIII, A. C. J., p. 114.

Such being the state of the law, the following important questions may be raised by an enquirer:—

(1.) What would be the effect of the adoption if a widow adopts a boy before any property has devolved upon her?

(2.) When property devolves upon a widow, by exercising the power of adoption, does she immediately divest herself of her rights, and does the property immediately devolve upon the adopted son? Can she divest greater rights than she herself possessed?

(3.) Suppose a Hindoo dies leaving a great grandmother, and a brother's daughter's son, the property in this case would devolve upon the paternal great grandmother for her life, and then it would descend to the brother's daughter's son. Can she, under the circumstances, adopt a son and thereby defeat the rights of the natural heir?

As to the first question, I quite agree with Hon'ble Justice Jackson that if a widow might have adopted a boy, when the property devolved upon her, she ought to be allowed to adopt even before that, and the boy so adopted ought to be allowed to take the property of the last full owner by conferring spiritual benefit on him.† I do not see that there is any force in the argument of the Privy Council, that the boy so adopted ought to inherit the property which devolved upon his adoptive mother for her life only

† Cal. Law Rep., Vol. IV, p. 538.

because she exercised the power of adoption in derogation of her own right, for she ought not to be allowed to do any act beyond the limit of her own right, which, according to the widest construction of the Hindoo law, can only amount to a life-interest. But the question is whether it would be expedient to allow the widow of a third person to create a new heir by adoption either of nearer or of equal degree to the last full owner, and thereby either partially or entirely defeat the right of his natural heir.

As to the second, the rulings cited above, though not clearly, would go to show that when property of persons, other than of a husband, even devolves upon a widow or a woman, she by adopting a son immediately divests herself of her right.* Suppose a woman inherits her own father's property, and then adopts a boy, will that boy immediately take the property from her mother, and thereby obtain a right which her natural born son could not have obtained? Can a natural born son ever divest his mother of her inheritance which devolves upon her from her father or son? Then how a son made by adoption can possess greater right than a natural born son has ever possessed? Then, again, suppose a Hindoo dies, leaving three grandsons by one daughter and a daughter. The property under the circumstances goes to the daughter. If by exercising the power of adoption, she immediately divests her right in favor of her adopted son, then the three grandsons by another daughter would be altogether deprived of their shares of inheritance, even after the death of their mother's sister, for in that case the adopted son would contend that the inheritance, having once been vested in him, cannot be divested. It is a mistake to assume that by allowing a widow, under the circumstances stated above, to adopt, no injustice is done to any body, *because she exercises the power of adoption in derogation of her own right.* What is the extent of her right? She has only a life-interest; she cannot do anything with regard to the property inherited by her to the prejudice of the reversioners. By allowing her to adopt and create a new artificial heir, we indirectly allow her to do what she cannot di-

* Mr. Rattigan understood the ruling in this way—Page 76, Rattigan on Adoption.

rectly do. If the adopted son of one person will not divest the estate of another, who has taken that estate as heir of a third person,* I do not see where lies the justice which would allow a widow to adopt a son to one person, and so create an heir of equal or of nearer degree to a third person, and thereby defeat the reversionary rights of persons who would have taken the property but for the existence of the widow. In such case the widow in fact exercises the power of adoption in derogation of the rights of the reversionary heir of the last full owner. A man dies leaving a sister's son and a mother. If he liked, he might have himself adopted a son. The property goes to the mother; and she adopts, and defeats the rights of the person on whom the last full owner looked as his heir. Whatever may be the superior rights of this adopted son when we regulate that right by the application of the spiritual cakes, would natural justice allow the widow to create such an heir? I admit that something may be said in favor of an adopted son on the ground of spiritual benefit: when he takes the inheritance by becoming a nearer heir, although, in the case stated above, the fact of a sister's son being unnecessarily deprived by the mother's adopted son, appears to be a great hardship, yet it can be argued in the language of Mr. Mayne "why he should not be "rewarded by the estate for the services he renders to the "deceased."† But is there any reason to allow a widow to create an artificial heir of equal degree, and thereby partially defeat the rights of the natural heir? as in the case of a daughter adopting a son when there are sons by another daughter. A daughter's adopted son does not confer greater spiritual benefit to the deceased owner than the sons of another daughter. If we allow the widow of *A*, by adopting a son to defeat the rights of the reversioners of *B*, let that adopted son take the property, as Hon'ble Mr. Jackson has put it by conferring spiritual benefit

* *Note*—B. H. C. Rep., Vol. VIII, p. 114, A. C. J.

† The author of the Dayabhaga and the majority of the sages, quite in disregard of the doctrine of the spiritual benefit, make the adopted son incompetent to inherit the property of anyone else except that of his adoptive father, and in doing so they were actuated by that sense of natural justice which would not allow one man to make a gift of the property of another. They wanted to keep the right of an adopted son within its natural limits.

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to the last full owner, and let that benefit be of a superior nature to that conferred by a natural heir, and not on the supposition, as the Privy Council rulings indicate, that a son adopted under the circumstances does not injure the rights of any one else, except that of the widow, "who exercises the power of adoption in derogation of her own rights." In a case like the one disclosed by the preceding pages, the following questions arise, *viz.* :—

(1.) Whether an heir created by adoption ought to be allowed to defeat the rights of the natural heir of a third person by conferring superior spiritual benefit on him.

(2.) Whether a son adopted under similar circumstances, ought to be allowed to take the inheritance left by a third person by becoming an heir of equal degree with his natural heirs.

I admit the root of injustice has been laid down by the ruling of the Privy Council in *Syam Chunder* v. *Narayani Dabea*, but the question is, would it be expedient for us now to allow that evil to run through all the branches, when we see by so doing, so many anomalies and cases of great hardship spring up in Hindoo society ?

It is one thing to allow an adopted son, existing at the time of the owner's death, to inherit his property either with his natural heirs, or to inherit it exclusively on the ground of his conferring superior spiritual benefit upon the owner; but it is quite another thing to allow a widow, after the death of the owner, to adopt a son to her husband, and create a nearer or an heir of equal degree to the aforesaid owner. This distinction will be borne out by the following passages in the *Tagore will* case :—

"The object of the Hindoo law is, that the property of a deceased "proprietor may be immediately made available for his spiritual "benefits and for that of his ancestors. There seems to be no "more authority for holding, that property can, according to "Hindoo law, be given by a will to a person not in existence, or "to a person not ascertained at the time of the death of a Hin-"doo testator, than there is for holding that a thing can be "inherited by a person not in existence or upon a contingency."

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'The result appears to me to be, that a gift cannot operate to 'pass property unless the donee is in existence."

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"I exclude from these remarks a posthumous child of the testator "and a son adopted by a widow of the testator after the death "of her husband. These cases depend upon particular law and "do not extend to posthumous sons of a stranger or to sons of a "stranger adopted by their widows after their death—(see "*Tagore will* case, pp. 102 and 103). An adopted son indeed takes the property of his adoptive father under a supposition as if he had existed at the time of his death, having been actually begotten by him; but no law of presumption can fix the time of an adopted son's birth, adopted by a stranger on a date previous to the death of the person whose property he would take by becoming a nearer heir; because he is presumed to have existed at the time of his adoptive father's death, it does not follow that he will be likewise presumed to have existed at the time of the death of every other person whose property he claims. (*Tagore will* case, p. 263.)

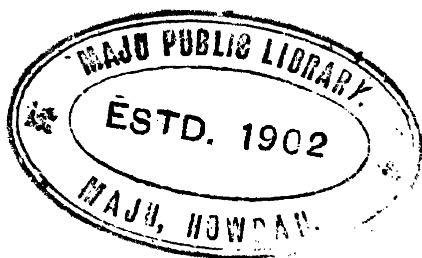
In my humble opinion, if the adopted son of the widow of *A*, adopted long after the death of *B*, whose property devolved upon her for her life only, be declared competent to inherit the property left by *B* in preference to his natural heirs, let him, *after the death of the widow*, take the property as stated by Hon'ble Justice Jackson, *on the ground of his conferring spiritual benefit to the last full owner*, and not on the ground that the widow exercises the power of adoption *in derogation of her own right*. I also agree with Hon'ble Justice Jackson to this extent, that if a son adopted by a widow, after any property has devolved upon her, can take that property by conferring spiritual benefit, a son adopted by a widow before the devolution of the property upon her, ought to be allowed to take that property for the same reason: but this I of course say subject to my preceding observations. The fact of a stranger's property devolving upon a widow for her life cannot confer a greater right upon her adopted son, than she herself possesses. Our Courts of Justice seem to think that, if an adopted son fully represents a natural

son, why he should be deprived of all the rights and legal privileges of such a son; but it is not at all surprising that it has escaped the notice of our foreigner Judges what amount of anomaly and hardship they have created in the Hindoo society by extending the rights of an adopted son, and in some cases making those rights superior to those of a natural son. Now, Hindoo brethren, if you wish that your natural heirs should inherit the property left by you, and not an adopted son of your mother, grandmother, or great-grandmother, you must make a will to that effect; otherwise your own sister's son may be superseded by a stranger adopted by your mother! This evil may—until it is laid down by our Courts of Justice, which seems likely will be done very soon, that no man can limit the heritable rights of a third person's adopted son—be avoided by the Hindoos of Bengal to whom the privilege of making a will has been long since granted: but what would be the fate of the Hindoos in the North-West? It is one thing to enlarge the power of a widow for adopting a son for the purpose of inheriting her own husband's property and for perpetuating his name and lineage, but it is quite another thing to extend that power for the purpose of collateral succession. It is impossible not to see that there are grave social objections in making the succession of property in the case of collateral succession dependant on the caprice of a woman subject to all the pernicious influences which interested advisers are too apt in India to exert over a woman possessed or capable of exercising dominion over property.

In the case of *Ranee Krishna Moni* v. *Rajah Udamanta Singh* (Sel. Rep., Vol. III, p. 304, new edition), it was held that, according to Hindoo law, a boy adopted by a widow, with the permission of her late husband, has all the rights of a posthumous son, and so that a sale made by her, to the prejudice of her late husband's property, even before the adoption, will not be valid, unless made under circumstances of inevitable necessity. But in the case of *Rajkisto Roy* v. *Kishory Mohun Mozoomdar* (W. R., Vol. III, p. 14), it has been held that though an adopted son is not actually precluded from ever questioning acts done by his mother during his minority or before his adoption, in the same manner as any other reversioner might question such acts,

yet a sale by a widow, with the consent of all legal heirs at the time existing, and ratified by decrees of Courts, is binding on reversioners as well as on an adopted son, adopted long after the sale.

In the case of *Gobind Nath Roy* v. *Ram Kanai Chowdheri and others*, it was held, on the principle laid down by the Judicial Committee in the case of *Bhoobun Moyee Dabea* v. *Ramkishore Aucharjee*, that when a Hindoo widow succeeds to the estate of her adopted son on his death, as his heir, and then alienates the property, the subsequent adoption by her of another son cannot divest the alienee of his rights under the alienation previously effected (W. R., Vol. XXIV, Civ. Rul., p. 183). But the Bombay High Court has held that a son, adopted to her husband by a widow, is entitled to set aside a gift of ancesteral immoveable property made by his adoptive father's widow previous to his adoption—*Nathaji Krishnaji* v. *Hari Jogoji* (Bom. H. C. R. Vol. VIII, A. C. J., p. 67.)



CHAPTER VI.

THE FORM TO BE OBSERVED IN ADOPTION, AND THE EFFECTS OF ITS OMISSION, AND HOW AND WHEN A SON CAN BE GIVEN IN ADOPTION?

REGARDING the mode of adoption, the rules laid down by Bridha, Goutama, Bandhayana, and Sanouka are observed; they enjoin that a person proceeding to adopt should give notice to the King (Rajah), and after having invited kinsmen, should complete the adoption by the observance of prescribed solemnities, *viz.*, a burnt-sacrifice and the recitation of the prescribed prayers; it is also necessary that the family priests and other holy Brahmins should be present at the ceremony. According to the authors of the Dattaka Chandrika and the Dattaka Mimansa, a son adopted without the observance of the religious ceremonies would not inherit the property of his adoptive father (Dattaka Mimansa, Sec. V, vv. 45 & 46; Dattaka Chandrika, Sec. II, v. 17; Sec. VI, v. 3). Menu also ordains: "He who "adopts a son without observing the rules ordained, should "make him the partaker of the rites of marriage, not a sharer "of the wealth."— (Menu quoted in Sec. 6, v. 3 of the Dattaka Chandrika).

The ceremonies, thus enjoined, have been divided into two classes—the secular and religious, the former consists in giving notice to the king and the invitation of kinsmen, and it is agreed that they are not legal essentials to the validity of adoptions, being merely intended to give greater publicity to the act and to avoid litigations and doubt regarding the successions of the adopted son. A formal adoption is not invalid, because it has not received the sanction of the ruling power; and where the ruling power does not interfere, an adoption without such sanction entitles the adopted son to succeed to

property of the nature of a service, *Watan—Ram Chandra Vasudeb* v. *Nanaji Zimaji* (Bom. H. C. Rep., Vol. VII, A. C. J. p. 26). With the exception of Jagannatha all other authorities in Bengal are uniform in their opinion that the non-observance of religious ceremony (*homa*) would invalidate the adoption; the author of the Dattaka Mimansa forbids a widow to adopt, and one of the reasons assigned for it was, that she could not utter the mysterious words of Veda (Pranaba প্রণব) necessary in the performance of *homa.* Jagannatha holds that "should the "oblation to fire, the party omitted, in consequence of inability "to complete it, the adoption is sometimes good in law, as "marriage and the like are valid in similar circumstances"—(Colebrooke's Dig., Vol. II, Bk. V, Chap. IV, Sec. VIII p. 391). So it seems that according to Jagannatha also the observance of the religious ceremonies is dispensed with only under special circumstances. But the modern tendency of our Courts of Justice is inclined towords holding that the mere giving and acceptance would constitute a valid adoption, and that the non-observance of the ceremonies, both secular and religious, would not invalidate the adoption.

In the case of *Nittanunda Ghosh* v. *Krishna Dyal Ghosh* (Ben. Law Rep., App. Civ., Vol. VII, p. 1; and W. R., Vol. XV, p. 300), it was held that ceremonies, which are necessary to be observed for a valid adoption among Hindoos of a superior class, are not necessary in case of an adoption by *Sudra;* and that in the case of an adoption by *Sudra,* mere giving and receiving may be sufficient to make the adoption valid—(see also *Dayamayi* v. *Rusbeharee Singh,* S. D. D., Vol. VII, p. 1001). In *Radha Madhav Ghashai* v. *Radha Bullub Ghashai* (17th September 1862, Hay's Rep., p. 311), it was ruled, that the Court, when satisfied the permission to adopt existed, will exact slight proof of the performance of ceremonies. So also in the case of *Prokash Chunder Roy* v. *Dhunmonee Dasi and others,* the adoption of a son was held to be proved on strong circumstancial evidence in the absence of direct proof of the performance of ceremonies—(24th January 1853, S. D. A., p. 96).

The Privy Council has also recently held, that *homa* ceremony is not necessary in the case of an adoption by a *sudra.*

Their Lordships, without expressing any opinion as to the correctness of the rule laid down by a recent decision of the Madras High Court, that even in the case of an adoption by a Bramini woman the ceremony is not necessary, and holding that the reasoning of the Madras High Court applies even *à fortiori* to *sudras*, observe: that "although it may be true that "the use of the ceremony in question on the occasion of an "adoption is so general amongst *sudras*, that the absence of it "may fairly, as Lord Wyndford observed, cast suspicion upon a "doubtful case of adoption, yet to hold that where the giving "and taking of a child in adoption are established the omision "of the ceremony invalidates that adoption would mischiev-"ously, as they conceive, strengthen the meshes of the purely "ceremonial law, and tend to encourage suits to impeach *bona* "*fide* adoptions."

Their Lordships did not clearly express any opinion as to the question whether the defects arising out of the nonperformance of the ceremony at the time of adoption can be cured by subsequent performance of it. But it can be gathered from the judgment, that they were prepared to allow the defect to be cured by subsequent performance of ceremony in cases where it may appear that, according to the arrangement of the parties, the ceremony was to be performed at a subsequent time—(*vide Indra Mony Chowdhurany* v. *Behary Lall Mullick*, 11th December 1879, Supplement to the *Englishman*, 23rd February 1880; and see also the case in Knapp's Report, Vol. II, p. 287). I do not think that it is requisite that the ceremony should be performed simultaneously with the actual giving and receiving of the child. There is nothing in the Hindoo law which would invalidate the adoption, if the ceremony and the formal giving and receiving of the child take place at any time subsequent to the actual giving and receiving.

I have already stated that for a man proceeding to adopt a son it is necessary for him to give humble notice of it to the king (Rajah). The expression Rajah has been explained by commentators to signify the chief of the town or village. The supporters of Lord Dalhousie's annexation policy argued that according to the rule of Hindoo law that notice should be given

to the king: the paramount power in India was entitled to grant or withhold permission to adopt, and that any adoption made by any native Prince without the permission of the paramount power was invalid for the purpose of inheriting the *Raj* of his adoptive father.

In the case of *Ram Suran Das* v. *Pran Kumar* (22nd May 1865, Sel. Rep., 193), it was held by the Agra High Court that, according to Hindoo law, a boy could not be adopted subject to the condition that the child should be obedient to his adoptive mother, and that if he fail to act up to this condition he was to be deprived from inheritance. The learned Judges observed :—" We " do not believe and cannot find that the Hindoo law recognizes " the conditional adoption which appears to leave unsecured " and in jeopardy the objects contemplated by the adopting, and " to involve an element of injustice to the adopted, party. Sir " Thomas Strange expressly declares that an adopted son suc- " ceeds to the right of a begotten son; that a Hindoo adoption " is permanent, except in the case of a *nitya dwyamushyayana;* " nor can the adopted be deprived of its advantages for any " cause or upon any pretence that would not forfeit to a son " begotten his natural right to inherit. No such cause is shown " in the present case for the exclusion of the defendant from the " inheritance in suit, insubordination to the widow of the de- " ceased adopting father being an insufficient one."

Now we proceed to consider how and when a son can be given in adoption. In dealing with this question we shall have again to refer to sloka 168 of Menu, Chap. IX :—

"মাতা পিতা বা দদ্যাতাং যমদ্ভিঃ পুত্রমাপদি
সদৃশং প্রীতি সংযুক্তং সজ্ঞেয়ো দত্রিমস্সুতঃ"

" He whom his father or mother gives to another as his son " provided that the donee have no issue, if the boy be of the " same class and affectionately disposed, is considered as the son " given."—(Sir William Jones's translation.) Italicized parts have not been taken. " He is called a son given, *dattrima*, whom his " father or mother affectionately gives as a son, being alike (by " class) and in a time of distress, &c."—(Mitacshara, Sec. XI, Chap. I, pp. 71, 72.) It appears from the above sloka of Menu,

that the father of the boy must be under some kind of distress when he gives the boy in adoption; and the second, that the boy should be affectionately given on disinterested motives. Kalluka Bhattya is of opinion that the term distress has reference with the receiver, that is, the giver can give his son in order to remove the distress of the receiver, arising out of his being destitute of a son, and has no reference whatever with the giver. This explanation of Kalluka is simply absurd.

The term distress in the above text of Menu is explained by Chanda Shora as referring to the inability of the natural father to maintain his offspring. Nanda Pandit expounds it as intending the necessity for adoption arising from the want of issue; but this interpretation is rejected by Ballum Bhattya; he explains the term as signifying famine or other calamity, *i. e.*, a natural father having several sons, can, at a time of calamity, give one of them in adoption; this interpretation is indeed reasonable. Ballum Bhattya is further of opinion, that if a man give away his son when in no distress, the blame attaches to him and not to the taker. I do not think that this rule with regard to the distress applies to the case of a brother giving his son to another brother; otherwise Sanouca, when placing a brother under so much necessity for adopting a brother's son, must have authorized him to depart from the rule when the brother giving the son may not be in distress. Sanouca's as well as of many modern writers' language is strong enough to exclude a brother's son in many respects from the general law of adoption. That this was the intention of the Hindoo lawgivers, is evident from the rule requiring one brother to adopt another brother's only son in *dwyamushyayana* form.—See Suth. Synopsis, Head II.

Another rule deduced from the above text of Menu, 168, Chap. IX, is, that a man must give his son on purely disinterested motives (প্রীতি সংযুক্তং). The words "*whom his father or mother affectionately gives*" have been explained that "a father or mother must amicably give their son, and not from avarice or intimidation;" so it will be seen that, according to the true Hindoo law, in order to entitle a person to give his son in adoption, he, in the first place, needs be under some distress, and in the second, the gift should not be made from avarice or intimidation,—

i. e., on disinterested motives. One must be in poverty, at the same time must be above temptation—two inconsistent conditions indeed. The rule with regard to the distress must be admitted as being justly explained by Ballum Bhattya, that it regards the giver only and renders him sinful, but does not invalidate the adoption; had it been otherwise, it would have destroyed one of the most desirable rules of Hindoo law that a boy should be selected first from the relatives, and then from those who are equal in class; for in that case, it would have been difficult for well-to-do persons, among whom the system of adoption generally prevails, to get a son from a poverty-stricken man of equal class. Whatever may be the spiritual effect for the non-observance of the rule with regard to distress, we do not think our Courts of Justice would invalidate an adoption because the boy was given when his father was not in distress. But it has been held that the adoption of a son, given by his natural father on interested motives, would be invalid according to Hindoo law—*vide Eshankishore Acharji and another* v. *Harish Chandra Chowdhry and another* (W. R., Vol. XXI, p. 381). The question of the Hindoo law, as stated above, arose in the case under the following circumstances:—

The suit was brought for the specific performance of contract, named *nirbandhapattro* (নির্ব্বন্ধ পত্র). Plaintiffs stated that they gave their son to be adopted by Harish Chandra Chowdhry, defendant No. 1, in consideration of receiving an annual allowance during their lives of Rs. 900. It was further stated that the draft of the agreement was partly drawn out; but that the defendant No. 1, being apprehensive that the adoption might be considered defective if any consideration was paid for the boy, it was settled that the contract should be concluded after the ceremonies necessary for the said adoption had been performed; and accordingly, defendant No. 2 gave the plaintiff a *rocka* on plain paper agreeing that if he fail to procure from the defendant No. 1 an agreement for a monthly allowance as stipulated after the ceremonies of adoption were over, he would be answerable. On the nonperformance of this contract plaintiffs instituted the suit against Harish Chandra Chowdhry and Durga Das Acharji, on a valuation of Rs. 9,500 or Rs. 9,000,

being ten times the amount of the annual allowance, and Rs. 500, the amount of the said allowance for six months and twenty days. The Subordinate Judge of Mymensingh, Baboo Bidhoo Bhusun Banerjee, in an able judgment, disallowed the claim. Plaintiffs therefore preferred a special appeal, and the High Court, in dismissing the appeal, remarked as follows:—

"The Subordinate Judge, Baboo Bidhoo Bhusun Banerjee, has
" dismissed the plaintiffs' suit. He was of opinion that the
" plaintiffs well knew that the contract was an unfair and im-
" proper one, and one which they could not declare publicly
" until after the performance of the ceremonies necessary under
" the Hindu law to render the adoption valid. Then he says
" that the Hindu law clearly provides that in the present age,
" the *Kali Yoog*, the adoption of sons given from disinterested
" motives alone are valid, and that the system of purchase which
" obtained in former times is no longer in vogue in the present
" age, and cannot be considered valid. But irrespective of the
" restrictions of the Hindu law, the Subordinate Judge was
" further of opinion that such a contract was immoral and con-
" trary to public policy as defined by section 23, Act IX of 1872.
" He, therefore, dismissed the plaintiffs' suit.

" The plaintiffs appealed against this decision, and Baboo Sri-
" nauth Das, who appears for them, argues,—1*st*, that there is no
" text of Hindu law prohibiting persons from entering into con-
" tracts of this description; and 2*ndly*, that the Subordinate Judge
" was wrong in applying the provisions of Act IX of 1872 to
" a case of this sort, as it was not against public policy for a
" Hindoo person to sell his son for the purpose of adoption.

" We entirely concur in this case with the judgment of the
" Subordinate Judge. In former days, before the present *Kali*
" *Yoog*, there were twelve descriptions of sons, and the eighth
" description, we find in the Hindu law, was the son adopted
" after payment of price. Such an adoption, namely, after pay-
" ment of price, is not recognized in the present *Yoog*—the *Kali*
" *Yoog*, the only adoption now recognized being that of dattaka
" son, or son given, who alone can take the place of *ourussa* son,
" or son of the loins.

" The son given, that is, *dattaka* son, is defined in the Dattaka

"Chandrika, Sec. 1, para. 12 :—'He is called a son given whom "'his father or mother affectionately gives as a son being "'alike;' alike being explained to mean of the same class. "Now, it could not be said, if this contract were carried out, that "the boy has been affectionately given; a gift, of course, implies "an act without consideration.

"Then with reference to section 23 of Act IX, we think that "the principle of that section is applicable to this case, as this "contract, if it were capable of being carried on, and were recog-"nized by the Court, would involve an injury to the person "and property of the adopted son, inasmuch as if it could be "proved that the boy was purchased and not given, it is very "probable that the adoption would be set aside, and if such "adoption were set aside, he would not only lose his status in "the family of his adopting father, but also lose his right of "inheritance to his natural parent; and such a contract would, "therefore, involve an injury to the person and property of the "adopted son; and again, such a contract, if permitted, would "defeat the provisions of the Hindu law, and that is one of the "restrictions laid down in section 23, Act IX of 1872. In that "section it is enacted that the consideration or object of an "agreement is lawful, unless it is forbidden by law, or is of such "a nature that, 'if permitted, it would defeat the provisions of "any law;' and it is very clear in this case that, if the Court "were to recognize a contract of this description, it would be "defeating the provisions of the Hindu law. Therefore, concur-"ring with the decision of the Subordinate Judge, we dismiss "the appeal with costs. The defendant No. 2 will be entitled "to separate costs."

CHAPTER VII.

KRITRIMA FORM OF ADOPTION.

Of the twelve descriptions of sons, *viz.*, " the son begotten by " a man himself in lawful wedlock, the son of his wife be- " gotten in the manner before mentioned, a son given to him, a " son made or adopted, a son of concealed birth, of whose real " father cannot be known, and a son rejected by his natural " parents, are the six kinsmen and heirs."—(Menu, Chap. IX, sloka 159.)

" The son of a young woman unmarried, the son of a pregnant " bride, a son bought, a son by a twice-married woman, a son " self given, and a son by *Sudra*, are the six kinsmen, but not " heirs to collaterals."—(Menu, Chap. IX, sloka 160.)

ঔরসঃ ক্ষেত্রজশ্চৈব দত্তঃ কৃত্রিম এব চ
গূঢ়োৎপন্নোঽপবিদ্ধশ্চ দায়াদাবান্ধবাশ্চ ষট্।

(Menu Sanghita, Chap. IX, sloka 159, p. 568.)

কানীনশ্চ সহোঢ়শ্চ ক্রীতঃ পৌনর্ভবস্তথা
স্বয়ম্দত্তশ্চ শৌদ্রশ্চ ষড় দায়াদ বান্ধবাঃ।

(Menu Sanghita, Chap. IX, sloka 160, p. 569.)

The author of the Dattaka Chandrika, on the authority of a passage attributed to Aditya Purana, holds that, at the present *Kali* age, among the substituted sons, the *dattaka* son is only valid—(*vide* Sec. I, v. 9, Dattaka Chandrika). The author of the Dattaka Mimansa, on the other hand, on the authority of Parasara, holds that *kritrima* son is also valid.

" দত্তপদং কৃত্রিমস্যাপ্যুপলক্ষণম ঔরসঃ
ক্ষেত্রজশ্চৈব দত্তঃকৃত্রিমকঃ সুত" ইতি কলি ধর্ম্ম প্রস্তাবে পরাশর স্মরনাৎ।

" The term given is inclusive also of the sons made, on account " of a text of Parasara on the occasion of treating on the law " of the *Kali* age."—(Dattaka Mimansa, Sec. I, v. 65.)

Now, I ask our Hindoo lawyers, whether the author of the Dattaka Chandrika was right in allowing Parasara to be overruled by a passage of Aditya Purana? Are not Puranas always inferior to Smritis? Even texts of sages other than Menu ought not to have overruled Parasara, for it is stated in Parasara Sanghita: The *Dharmas* enjoined by Menu are assigned to the *Satya Yoog;* those by Gotama, to the *Trita;* those by Sancha and Lichita, to the *Dwapara;* and those by Parasara, to the *Kali Yoog.*

"কৃতেতু মানবা ধর্ম্মা স্ত্রেতারাং গৌতমাঃ স্মৃতাঃ
দ্বাপরে শাঙ্খ লিখিতাঃ কলৌ পরাশরাঃ স্মৃতাঃ"

So it will be seen that, even admitting Menu's superiority over all sages, *kritrima* son ought to have been declared valid, as Parasara ordained, for he is not inconsistent with Menu; and besides that, he is the lawgiver of the *Kali Yoog;* and our present legislature, represented by the late Lord Dalhousie's Council, indirectly admitted that fact by passing the Hindoo Widow Remarriage Act. Of all the inhabitants of India, Bengalees, who raised such a clamour for the superiority of Parasara in the *Kali* age, would, I think, be ashamed of disallowing Parasara, by the authority of Aditya Purana, or any other authority than that of Menu. We learn from Sutherland and other English writers, that *kritrima* form of adoption is only prevalent in Mithila, and has become extinct in other countries.

If the kind of sons we so often meet among the lower castes in Bengal, called *palakputtra,* who are in every way treated as adopted sons, and about whom we find no litigation, because they have no patrimony worth fighting for to inherit, do not come within the category of *kritrima* son, I must then join with the English writers to say that the *kritrima* form of adoption is only prevalent in Mithila. This system of adoption does not certainly now obtain among the zemindars of Bengal. I now proceed to consider what are the rights of a *kritrima* son in the provinces of Mithila, and how a *kritrima* adoption may be effected. No ceremonies are necessary to constitute a *kritrima* adoption, the agreement of the parties being alone sufficient—*Kalyan Singh* v. *Kripa Singh* (Sel. Rep., Vol. I, new edition, p. 11).

The prohibition with regard to the adoption of a sister's son does not apply to the case of *kritrima* form of adoption; and it effects no change either of paternity or of maternity; there is merely an arrangement between the adopter and the adopted, with the addition of certain legal rights of inheritance and legal duties—*vide Chowdhury Parmeshrar Datt* v. *Hanooman Datta Ray* (Sel. Rep., Vol. VI, p. 235, new ed.)

A *kritrima* son, in some instances, may be invested with every filial right. The *kritrima* son, as usually affiliated in Mithila country, would, indeed, take the estate of his adoptive father. (See note 18, Sutherland's Dattaka Mimansa and Dattaka Chandrika.) But a son affiliated in *kritrima* form by a widow, is not regarded as related in any way to her husband, and merely succeeds to her exclusive property. (See note 5, and see also notes 15 to 21, Dattaka Mimansa and Dattaka Chandrika.) I do not find any reason for holding that the *kritrima* adopted son would succeed to his adoptive mother's property, and not to his father's, or to that of the adoptive father and not to the mother's, or, in other words, that he should only succeed to the property of the adopter.

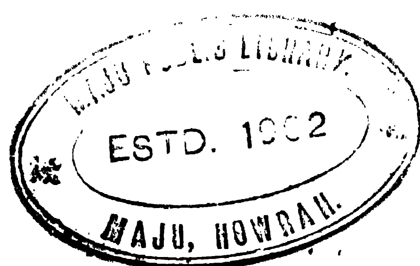
In the case of *The Collector of Tirhoot on behalf of the Court of Wards* v. *Hari Prasad Mahanta* (W. R., Vol. VII, p. 500), it was held, that a Hindoo widow in Mithila has power to adopt a son in *kritrima* form without her husband's consent; but such a son would not succeed to the property left by the husband of his adoptive mother, but would be considered her son, and entitled to succeed her only. It was further held, that such a son does not lose his position in his own family. I do not see any reason for making this distinction unless one would attempt, like the pandits of old, to overcome clear passages of Hindoo law, too stubborn for other manipulation, by the often baseless allegation of custom. If *kritrima* system of adoption is allowed to prevail, let the *kritrima* son take the property as Menu ordains:—

"ঔরস ক্ষেত্রজৌ পুত্রৌ পিতৃরিকথস্য ভাগিনৌ।
দশা পরেতু ক্রমশো গোত্ররিক্থাংশভাগিনঃ ॥"

(১৬৫ শ্লোক ৯ অধ্যায় মনুসংহিতা)

The son of the body and the son of the wife will divide the

"property between themselves, left by their father. As for the "other ten sons, let them take the property as enumerated, "those last named being excluded by any one of the preceding." According to sloka 159, Chap. IX, *kritrima* son stands fourth in the list; so, in the absence of an adopted son, he (the *kritrima*) ought to be entitled to all the legal rights given to an adopted son. He ought to be allowed to take not only the property of his adoptive mother's husband, but being within the first six of Menu's enumerations, like an adopted son, he ought to take the property of his adoptive father's relatives, both *sogotra* and *asogotra*. (*Vide* Cal. Law Rep., Vol. IV, p. 538.)


ESTD. 1902
MAJU, HOWRAH.

Appendix.

Read the under-mentioned lines in connection with Chapter III, and after the case of *Nathaji Krishnaji* v. *Harijogagi*, Bom. H. C. Rep., Vol. VIII, A. C. J., p. 67 ; see page 32 of this book :—

In the case of *Lakshmappa* v. *Ramava* (Bom. H. C. Rep., Vol. XII, p. 364, A. C. J.), it was held, that, in Western India, an adoption amongst *sudras* is not invalid although the person adopted was married before his adoption, nor although he may be a son of the adopter's sister, and therefore not a *sogotra* with the adopter.

It was further held, that even among Brahmins marriage does not disqualify for adoption, because Menu, Kalluka, Yajnyawalcya or Vijyaneshwara does not mention marriage as a disqualifying cause. The Court remarks :—" On the contrary, we find Dharma Sindhu, the " Sanskar Kaustabha, and Vyavahara Mayukshya distinctly recognizing " the adoption of a married man. The latter even going a step beyond " the other two and laying it down, that a married man who has even " had a son born may become an adopted son ; and accordingly, in " the case of *Sri Brij Bhookunji Maharaj* v. *Gokoolootsavaji Maharaj* " (1 Borr., 181), the adoption of a married Brahmin of the age of 45, " and having a family, was considered a good adoption." So, according to this ruling, marriage is not even a legal bar to adoption. With regard to the *chudákarana* and *upanayana*, the Court remarks :—" It has been " contended, that as the *chudákarana* and the *upanayana* ceremonies of " the person to be adopted should be performed in the adoptive family, " the adoption must take place at a sufficiently early age ; and no " doubt there is authority for saying that, if a boy, eligible in other " respects, can be obtained, upon whom these ceremonies have not been " performed in his natural family, he is to be preferred for adoption to " one upon whom they have been performed. But any such rule is " obviously intended for the three superior or regenerate classes, and " not for the sudras, those ceremonies not obtaining among them ; " even in the case of a Brahman boy for whom those ceremonies have " been performed in his natural family, his adoption is not on that " ground invalid. He notwithstanding acquires the legal *status* of an " adopted son, the fact of those ceremonies having been already per- " formed, only rendering necessary, in a religious point of view, the " reperformance of those ceremonies and the performance of certain

"additional ceremonies in the adoptive family, the latter being con-"sidered to have the effect of annulling those performed in the boy's "natural family."

From the above remarks of the Bombay High Court it seems clear that the rule of the Hindoo law which requires that the boy should be adopted before his *upanayana* and marriage, has no application in the countries within the jurisdiction of the Bombay Presidency (Bom. H. C. Rep., Vol. XII; see the remarks of Justice Nanna Bhai Hari Das in pp. 368-369).

CHAPTER I.

In connection with *Rangma* v. *Achma*, P. C. Judgment, Vol. I, p. 197, and *Manmatthu Nath Dey* v. *Anath Nath Dey*, Bourke's Rep., O. J., p. 189:—

A second adoption is invalid, while the first adopted son exists and retains his character of a son—Bom. H. C. Rep., Vol. XII, p. 364, A. C. J.

CHAPTER III.

See *Chinna Gaundan's* case, Mad. Rep., Vol. I, p. 54, and *Raja Upendra Lal* v. *Srimati Ranee Prasanna Moyee*—quoted in Chap. III. Read the following lines in connection with those cases:—

When a widow gives her only son in adoption, in that case doctrine of *factum valet* does not apply, neither the gift can be presumed to have been made under the implied consent of her husband; but she can give one of her several sons under that implied consent. Where a father gives his only son in adoption as a *dwyamushyayana*, he consents to deprive himself of one-half of the spiritual benefit derivable from the performance of religious obsequies. Hence his consent cannot be implied even to such a gift when made by his widow after his death. To such a case the *factum valet* principle is wholly inapplicable, because the adoption would be, as regards her, not *quod fieri non debuit*, but *quod fieri non potuit*. Possibly in some cases where a father is enjoined not to give in adoption, and such an injunction is merely directory and not mandatory, the *factum valet* would be applicable.

With regard to the question whether a father can give his only son in adoption, the Court remarks:—"We do not propose now to give any final opinion on the question whether a gift in adoption of an only son by his father is, in this Presidency, void, but are content, for the purposes of this case, and for those purposes only, to assume that it is not so; that the texts in relation to it are directory only; and that, if such an adoption were made in opposition to those texts, the principle

factum valet should be applied to it"—*Lakshmappa* v. *Ramava* (Bom. H. C. Rep., Vol. XII, p. 364, A. C. J.; but see p. 391). In this case the Judges have dissented from *Mhalsabai* v. *Vithoba* (Bom. H. C. Rep., Vol. VII, Appx., p. xxvi) so far as it supported the gift of an only son by a widow without the authority of her husband.

CHAPTER V.

READ this in connection with *Chitks Rughunath Rajadiksh's* case in Bom. H. C. Rep., Vol. XI, p. 199; see p. 143 of this book:—

Ramasawmi Aiyan v. *Venkataramaiyan* (Ind. App., Vol. VI, p. 196):—A Hindoo widow, living her husband's minor adopted son, alienated two-thirds of her husband's estate. On the son's death, she being heiress to the son, but, under an authority from her husband, adopted the plaintiff, while an infant, whose natural father gave him in adoption under an agreement, that he would inherit only about one-third of his late adoptive father's estate, being aware, or not caring to enquire, how the two-thirds thereof had been disposed of. The plaintiff, two years after coming of age, and his adoptive mother, executed an agreement, dated the 19th of August, 1871, and reciting the said alienations, whereby mother and son entered into a family arrangement with respect to the undisposed portion of the property. In a suit by the second adopted son to set aside the alienation, and to recover the whole estate of his adoptive father (it appeared that the agreement of 1871 was voluntarily executed by him whilst he was aware of his rights),—the Privy Council (without expressing any opinion as to the question, whether a natural father can, by agreement before adoption, renounce all or part of his son's right, so as to bind that son when he comes of age)—*held*, that the agreement of the natural father in this case was not void, but, at least, capable of ratification when his son came of age; and that the same was validly ratified by the said agreement of the 19th of August, 1871.

READ the undermentioned case in connection with para. last of page 25:—

In the case of *The Collector of Surat* (appellant) v. *Dhirsingji Vagh Baji* (respondent) (Bomb. H. C. Rep., Vol. X, p. 235, A. C. J.), it was held, that when the natural father is dead, and the mother is living, she is the only person who can give in adoption. The Hindoo law

does not authorize the paternal grandfather or any other person to give in adoption in such a case.

READ the following lines in connection with para. 2, p. 167 :—

It was further held in the above case, that to constitute a valid adoption there must be a gift and acceptance.

READ this in connection with *Eshan Kisor Acharji's* case in page 171 :—

" Again the plaintiff could have no right as claiming from Tircapa, " for Tircapa was a bought, not an adopted, son, and as a bought son " he could not succeed ; and adopted he could not be, because Gow- " dapa had already another adopted son as well as a son born, and " the fact of Tircapa's marrying a daughter excludes the possibility of " his being a son, for such marriage would have been incestuous.— " *Yachereddy Chinna Bassavapa and others* v. *Yachereddy Gowdapa* (P. C. " Judgment, Vol. I, p. 41 ; but see p. 43, last para.) In this case it was " further held that, according to Hindoo law, a person cannot succeed as " the adopted son of a daughter who has brothers alive, and who cannot " be an appointed daughter if she had brothers when she married, nor " can he succeed as claiming under a bought son."

READ the undermentioned case in connection with *Chinna Gaundan's* case in page 33 of this book :—

In the case of *Hanumun Tiwary* v. *Chirai* (Ind. Law Rep., Vol. II, Allahabad Series, p. 164), it was held, by a Full Bench of the Allahabad High Court (Turner, J., dissenting), that the adoption of an only son cannot, according to Hindoo law, be invalidated after it has once taken place. The Court assigned the same reason as in *Chinna Gaundan's* case, that the prohibition contained in the Hindoo law with regard to the adoption of an only son is merely binding upon the conscience of the pious Hindoos. The violation of the rule cannot invalidate the adoption. It was further held, that the maxim *factum valet quod fieri non debuit* applies in such cases. Justice Turner, after remarking that, in the presence of several conflicting rulings on the question, he is at liberty to come to an independent conclusion by the aid of the texts and principles which are to be gathered from the original works of the Hindoo law, proceeds thus :—

" The object of adoption is the perpetuation of lineage and the " spiritual benefits which accrue to the parent of a son, and, in virtue

"of the benefits which he can render, the adopted son succeeds not "only to the estate of the person who has adopted him, but to colla- "terals of that person; and to constitute a valid adoption there must "be a competent giver. The Mitacshara, Ch. XI, Sec. xi, v. 11, ex- "pressly declares—'an only son must not be given (nor accepted).' "For Vashishtha ordains:—'Let no man give or accept an only "son.' The Dattaka Mimansa, a work of high authority in these "Provinces, declares (Sec. IV, vv. 5 & 6) that a father is incompetent "to give an only son, and (v. 4) that the offence of extinction "of lineage is incurred both by the giver and the adopter; and "again (Sec. II, v. 38) the author, recognising the force of "prohibition, declares, it does not apply to the case in which the "son of one brother is made common to another brother also. In the "Vyavahara Mayukha, Ch. IV, Sec. V, vv. 9, 11, the same prohibition "is declared, and in the Dattaka Chandrika, Sec. I, vv. 27 and 29, the "rule is distinctly based and supported by the text of Sanouca:—'By "no man having an only son is the gift of a son to be ever made.'

"It is to be noticed that, although the Mitacshara, Ch. I, Sec. xi, "v. 12, goes on to declare that 'nor, though a numerous progeny exists, "should an eldest son be given, for chiefly he fulfils the office of a "son;' neither in that work, nor in any of the works to which I have "referred, is there any declaration that extinction of issue would follow "the gift (as it obviously would not), nor is the limitation of the "paternal power to make a gift extended to an eldest son. The Mitac- "shara also gives the reason for what appears to me a dissuasive "rather than peremptory injunction—'By the eldest son as soon as "born a man becomes the father of male issue.'

"On these grounds, then, that a father is incompetent to give an "only son, and that the object of adoption wholly fails if such a gift "be attempted, I am of opinion that the adoption of an only son is "invalid, and that the principle *fieri non debet factum valet* cannot be "applied. The consequence of the contrary ruling would be, according "to Hindu law, to inflict a penalty not only on the giver and receiver, "but on the collaterals of the receiver, whose property might descend "to a person solely entitled to claim it on account of benefits he is "presumed to confer, but which he could not possibly confer."

READ the undermentioned case in connection with the cases in pages 27 to 29 of this book:—

Adoption of the mother's sister's son is valid among Sudras. The

rule prohibiting the adoption of one with whose mother, in her maiden state, the adopter could not have legally intermarried, is not binding on Sudras. *Chinna Nagayya* v. *Pedda Nagayya* (Ind. Law Rep., Vol. I, Mad. Series, p. 62).

READ the undermentioned case in connection with the *Tara Mohan Bhattacharjee's* case (W. R., Vol. IX, p. 423) in page 112 of this book :—

On partition in a Mitacshara family, an adopted son and the adopted son of a natural son, stand exactly in the same position, and each takes only the share proper of an adopted son,—*i. e.*, half of the share which he would have taken had he been a natural son. The fact that such an adopted son, a member of a Mitacshara family, becomes, upon adoption, a joint owner of the family property, will not prevent the operation of the rule. *Raghubanund Doss and others* v. *Sadhu Charan Doss* (Ind. Law Rep., Vol. IV, Cal. Series, p. 425).

READ this in connection with *Rangma* v. *Achma* (P. C. Judgment, Vol. I, p. 197) in page 10 of this book :—

As a man cannot, while he has an adopted son living, adopt another son, so neither can his widow, after his death, by virtue of any authority delegated from him, adopt a son while an adopted son is still living—*Gopee Lall* v. *Mussamut Sree Chandraolee Buhoojee* (W. R., Vol. XIX, p. 12).

READ this in connection with the *Natore* case (W. R., Vol. XVIII, p. 218, and Special No., W. R., p. 106) in page 107 of this book :—

The case of a Hindoo claiming by adoption, under a will, which was put forward shortly after the testator's death, and which was acted upon and recognized for a period of twenty-seven years by the whole family, the validity of which will was questioned in a suit brought by the person adopted against members of the family, was considered to be analogous to a case in which the legitimacy of a person in possession is questioned a very considerable time after his possession has been acquired by a party who has a strict legal right to question his legitimacy. In such a case, the defendant, in order to defend his *status*, should be allowed to invoke against the claimant every presumption which reasonably arises from the long recognition of his legitimacy by members of

the family or other persons—*Rajendra Nath Haldar* v. *Jogendra Nath Banerjee* (P. C. Judgment, Vol. II, p. 422).* See also the case of *Bhima Deo Kesari Maharaj* v. *Sree Kundona Debi* (Ind. App., Vol. III, p. 154), where the Privy Council attached a great weight upon the presumption that a Hindoo, on his deathbed, would desire to perform that duty which prompts a childless Hindoo to supply the want of natural male issue by adoption. This case is also cited in page 12 of this book in connection with the *Ramnad* case.

LIMITATION.

THE Statute of Limitation applies to suits raised to challenge an adoption — *Chocummal* v. *Surathy Amay and another*, 22nd April, 1854 (S. D. A. and Appx. to D. Ch. and D. M., p. 215, 1854, p. 31, Morehead and Strange).

Held, that a suit brought to set aside an adoption, upwards of twelve years after such adoption had been declared, with the full knowledge and in the presence of the parties suing, cannot be admitted—*Gobind Kishore Ray* v. *Radhamadhab Audhicary*, 26th May, 1856 (S. D. A., p. 450).

A suit to set aside the adoption of a second son must be instituted within twelve years from cause of action—*Radhakishen Mohaputtra* v. *Sreekishen Mohaputtra*, 31st August, 1864 (W. R., Vol. I, p. 62).

The provision in the schedule to the Statute of Limitations, Act IX of 1871, wherein it is enacted that, with respect to a suit to establish or set aside an adoption, the time when the period of limitation begins to run "is the date of the adoption or (at the option of the plaintiff) the date of the death of the adoptive father," though might bar a suit brought only for the purpose of setting aside the adoption, does not interfere with the right which, but for it, a plaintiff has of bringing a suit to recover possession of real property within twelve years from the time when the right accrued —*Raj Bahadoor Singh* v. *Achumbit Lal* (Ind. App., Vol. VI, p. 110).

THE EFFECTS OF ADOPTION.

HELD, that an adopted son is entitled to share collaterally, and the son of an adopted son is entitled to the rights of his father—*Kishen*

* Long possession under an adoption will avail nothing if the adoption fails—*Rajah Haimunchull Singh* v. *Koomar Gunsheam Singh* (W. R., Vol. V, P. C. R., p. 69).

Nauth Roy v. *Hurree Gobind Roy and others*, 12th January, 1859 (S. D. A., p. 18.)

Held, in accordance with previous precedents of the Court, that, in Bengal, where the Dayabhaga prevails, an adopted son succeeds, collaterally as well as lineally, in the family of his adoptive father,—that is, to the agnates or *sapindas* of his adopting father, whether he succeeds to the *bandhoo*, or cognate relation, is not now before the Court—*Lakhee Nath Roy, &c.*, v. *Shama Soonduree*, 30th December, 1858 (S. D. A., p. 163); *Gooroo Pershad Bose*, alias *Hubbeehur Rhuman*, v. *Rash Behary Bose*, 2nd April, 1860 (S. D. A., p 411).

Power of adoption in a widow does not, *per se*, divest her of her life-interest—*Musst. Tareenee*, alias *Shaye Monee Dabea*, v. *Bamun Dass Mookerjee and others*, 30th September, 1850 (S. D. A., p. 533).

CHAPTER III.

The rule which requires *upanayana* to be performed among Brahmins within the age of eight years, is merely directory, and the ceremony will not be vitiated though performed at a later period. The adoption of a Brahmin is valid, if made before the *upanayana* has been performed, though the boy may have passed the age at which that ceremony ought, according to strict rule, to be accomplished—*Streenevassien* v. *Sashyummal*, 16th July, 1859 (M. S. U., Decs., 1859, p. 118); see *Kirt Narayan's* case in page 30 of this book.

RULES REGARDING THE PERMISSION OF THE HUSBAND FOR ADOPTION.

According to the Hindoo law, a power to adopt may be given verbally.

The widow of a childless member of a divided Hindoo family is entitled to a life-interest in her husband's estate after the death of an adopted son before attaining majority—*Soondar Koomaree Debea* v. *Gudadhur Pershad Tewaree* (P. C. Judgment, Vol. I, p. 294); see *Musst. Tareenee*, alias *Shaye Monee Debea*, v. *Bamun Dass Mookerjee and others*, 30th September, 1850 (S. D. A., p. 533).

According to Hindoo law, neither registration of the act of adoption, nor any written evidence of that act having been completed, is essential to its validity—*Sutroogun Sutputty* v. *Sabitra Dye* (W. R., Vol. V, P. C., 109; see also W. R., Vol. VI, 133; W. R., Vol. XV, P. C., 12).

If a Hindoo by will express a wish to be represented by an unborn son of a particular person, who has but one at the time, and who has

no other living at the death of the testator, his widow is not bound to wait indefinitely the birth of a second son for the purpose of adoption under her husband's will; but may, without waiting, adopt any competent person she may think proper—*Verapermall Pillai* v. *Narrain Pillai and others*, 5th August, 1801 (1 Strange, 91).

It is supposed, by several writers on the Hindoo law of adoption, that the Privy Council, in the case of *Gobinda Soondaree Debea* v. *Jagadamba Debea and others* (P. C. Judgment, Vol. II, p. 375), laid it down as a rule that a Hindoo widow, taking no steps to adopt until the death of the last male member of her husband's family, forfeits her claim to adopt. I do not think the language of the judgment justifies such a conclusion: their Lordships have simply drawn an inference from the conduct of the lady unfavorable to her allegation as to her possessing a power of adoption from her husband.

CHAPTER VI.—CEREMONY.

AMONGST Sudras in Bengal no ceremony is necessary to make a valid adoption in addition to the giving and taking of the child in adoption—*Behary Lall Mullick and another* v. *Indra Mony Chowdhrain* (W. R., Vol. XXI, p. 285). This case was decided by a Full Branch, and it has been recently confirmed by the Privy Council; see p. 168 of this book, and Supplement to the *Englishman*, 23rd February, 1880.

CHAPTER III.

HINDOO law does not allow of the adoption of *Paluk Putro*—*Kali Chandra Chowdhry* v. *Shib Chunder*, 12th April, 1865 (W. R., Vol. II, p. 281).

CHAPTER V.

A SON adopted by the dattaka form of adoption, which is in use in Bengal, into another family, is thereby excluded from inheritance in his own family—*Sri Nath Serma* v. *Radhakant* (Sel. Rep., Vol. I, p. 19, new edition).

CHAPTER VI.—FORM AND MODE OF ADOPTION.

ALTHOUGH the Hindoo law does not require that adoptions should be acknowledged in writing, it is usual, when persons in the situation of

life of a zemindar, adopt sons, to acknowledge such adoption in writing, to give notice to the ruling power, and to invite the neighbouring zemindars and others to be present at such an adoption—*Sutroogun Sutputty v. Sabitra Dye* (W. R., Vol. V, P. C., 109) see also W. R., Vol. XVIII, p. 218. See *Rajah Vassereddi Ramanadha Baulu* v. *R. V. Jugganadha Baulu*, 4th March, 1832 (1 Decs. of M. S. U., 520, Bird and Huddleston). Publicity, if not absolutely essential to the validity of an adoption, is always sought on such occasions—*Id.*

Contemporaneous publicity and circumstances are the best evidence to prove a deed of permission and an adoption under it (S. D. D. for 1857, p. 244).